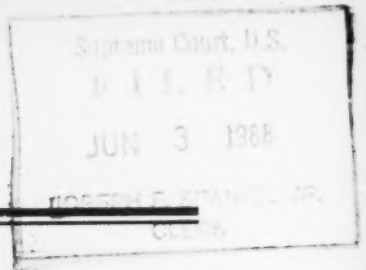


87-1988 (1)

No.



IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

MIAMI CENTER LIMITED PARTNERSHIP,
MIAMI CENTER CORPORATION, THEODORE B. GOULD,
CHOPIN ASSOCIATES and
HOLYWELL CORPORATION,
Petitioners

v.

THE BANK OF NEW YORK
Respondent

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

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QUESTIONS PRESENTED

1. Is an order of a bankruptcy court confirming a plan of reorganization, over the objections of the debtors and others, immune from all review because the debtor cannot post a bond to obtain a stay pending appeal?
2. Does the doctrine of mootness prevent any appeal of an unstayed order authorizing a sale of property, as part of a reorganization plan, even when the creditor-purchaser is a party to the appeal?
3. Does an appellant, by submitting to an order of a bankruptcy court while seeking its reversal, render that appeal moot?
4. Did the court below err in holding that the district court was compelled to dismiss a debtor's appeal as moot, despite the presence before the court of all parties affected by the requested relief and despite the fact that the plan whose confirmation is appealed continues to control the actions of a trustee created thereunder?
5. Can issues of alleged deprivations of procedural and substantive due process guarantees of the Constitution, along with statutory illegalities, in a confirmed plan of reorganization evade review through application of a rule of mootness?

PARTIES TO THE PROCEEDING

Petitioners before this Court, appellants before the United States Court of Appeals for the Eleventh Circuit, are Theodore B. Gould, Holywell Corporation, Miami Center Limited Partnership, Chopin Associates, and Miami Center Corporation. The Respondent is the Bank of New York, which was the appellee below. An additional interested party to the proceedings is Fred Stanton Smith, Trustee of the Miami Center Liquidating Trust.

Pursuant to Rule 28.1, the only Petitioners which are corporations are Holywell Corporation, which has no parent corporation and no subsidiaries or affiliates except wholly-owned subsidiaries, and Miami Center Corporation, a wholly-owned subsidiary of Holywell Corporation. Miami Center Corporation has no subsidiaries and its only affiliates are other wholly-owned subsidiaries of Holywell Corporation (none of which were debtors in the Chapter 11 proceeding below.)

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**PETITION FOR WRIT OF CERTIORARI TO THE
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Petitioners Miami Center Limited Partnership, Miami Center Corporation, Theodore B. Gould, Chopin Associates and Holywell Corporation respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered on March 10, 1988, denying a Petition For Rehearing and Suggestion Of Rehearing In Banc upon that court's original opinion entered on June 29, 1987, and previously supplemented by its order on rehearing entered on September 8, 1987.

OPINIONS BELOW

The United States Court of Appeals for the Eleventh Circuit's opinion, entered March 10, 1988, is reported at 838 F2d 1547 and is reprinted in the Appendix hereto ("App.") at 1a. The original opinion of the court of appeals below, entered on June 29, 1987, is reported at 820 F2d 376 and is reprinted at App. 26a. The court of

appeals' order of September 8, 1987 is reported at 826 F2d 1010 and is reprinted at App. 24a. The lower court opinions which are the subject of the appeal below and relevant to the Court's consideration of this Petition are also reprinted in the Appendix and if such opinions have been reported, the citation is indicated in the Table of Contents to the Appendix.

JURISDICTION

Petitioners appealed to the Eleventh Circuit Court of Appeals from orders of the United States District Court for the Southern District of Florida, App. 35a and 61a, one of which affirmed a Confirmation Order, as amended *nunc pro tunc* on remand, of the United States Bankruptcy Court for that district, App. 123a. The Court of Appeals, by order and opinion entered June 29, 1987, denied Petitioners' appeal as moot. App. 26a. A timely Petition for Rehearing was filed and on September 8, 1987, the Court of Appeals corrected a portion of its earlier opinion. Appellee (Respondent herein) then filed a timely Petition for Rehearing from the corrected opinion. Petitioners timely filed a Suggestion of Rehearing In Banc. On March 10, 1988, the Court of Appeals entered its final order and opinion, App. 1a, denying rehearing and suggestion of rehearing in banc, but further supplementing its original opinion by vacating its prior order of September 8, 1987, and vacating the affirmation order of the district court with directions that the district court dismiss as moot the Petitioners' original appeal of the bankruptcy court's confirmation order.

The jurisdiction of this Court to review the judgment below is invoked under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The applicable provisions of the United States Constitution and the United States Code are set forth in the Appendix hereto at page 163a.

STATEMENT OF THE CASE

In Petitioners' appeal (pursuant to 28 U.S.C. § 158) from an order affirming the confirmation of a "crammed down" Chapter 11 plan of reorganization (and the forced dismissal as a chose-in-action, pursuant to that plan, of a federal civil action against the plan's proponent), the United States Court of Appeals for the Eleventh Circuit has ruled that the appeals must be dismissed as moot, despite a continuing controversy and the presence before the court of all affected parties, because the Petitioners, as debtors, could not post a \$50 million supersedeas bond to stay the plan's implementation. The underlying proceedings and background are as follows:

On August 22, 1984, Petitioners each filed a separate petition for relief under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. § 101 *et seq.*, in the aftermath of foreclosure actions initiated by, and disputes over the lending practices of, Respondent The Bank of New York as the lead interim lender in the construction and development of the Miami Center, a mixed-use commercial real estate project, located in downtown Miami, Florida. The five separate proceedings in the United States Bankruptcy Court for the Southern District of Florida were immediately consolidated, but for administrative purposes only.

The Petitioners had also filed, on January 20, 1985, a civil action against the Bank and its participating lenders in the United States District Court for the Southern District of Florida (District Court No. 85-0228-CIV-HOEVELER, hereinafter the "Lender Liability Suit.") The complaint, as amended, alleged six counts, including breach of contract relating to the failure to provide tenant non-disturbance agreements, violations of the Racketeer Influenced and Corrupt Organization Act (RICO) and usury.

During the course of the Chapter 11 proceedings, the Petitioners continued to operate and manage their sep-

arate businesses as debtors-in-possession. Although each Petitioner timely filed a Disclosure Statement and Plan of Reorganization in the bankruptcy court on February 15, 1985 (amended on March 21, 1985), the court allowed competing creditor plans to be simultaneously filed and submitted to creditors. Thereupon the Bank of New York, as the major creditor, filed on February 26, 1985, a Consolidated Disclosure Statement and Plan of Reorganization.

The principal elements of the Bank's Plan were as follows:

(a) Substantive consolidation of the debtors' estates;

(b) Appointment of a "trustee" and creation of the Miami Center Liquidating Trust in which the property of the debtors' estates was vested.¹

(c) The Trustee's sale of the land, the Pavillon hotel, the Edward Ball Office Building, the garage and shopping mall to the Bank of New York or its nominee for \$255.6 million, payable by cancelling the mortgage debt including accrued unmaturred interest to the closing of the sale, with the balance paid in cash;

¹ "... [vesting in the] Trustee . . . all property of the estate of the Debtors within the meaning of Section 541(a) of the Code, including but not limited to, Miami Center, the Washington Proceeds, and all claims and causes of action, if any, of the Debtors . . . to hold, liquidate, and distribute such Trust Property according to the terms of this Plan"; "... (c) Reduce all of the Trust Property to his possession and hold the same"; (d) Sell and convert the Trust Property to cash and distribute the proceeds as specified herein"; (e) Manage, operate, improve, and protect the Trust Property . . . and (j) Release, convey or assign any right, title or interest in or about the Trust Property"; "... (u) Settle, compromise, release, discontinue, or adjust by arbitration or otherwise any disputes, litigations, or controversies in favor of or against the Trust Property or the Debtors or any of them"; "... (w) Deal with the Trust Property or any part or parts thereof . . . as would be lawful for any person owning the same" and "(x) Take no action that would change the business of any of the Debtors as conducted at or prior to the filing of the Petitions." [Emphasis supplied]

(d) Taking of assets *not* the property of the debtors' estates, owned by non-filed solvent affiliated creditors, and leased to the Miami Center Limited Partnership, without the consent of the owner/lessors, without additional consideration and without provision for the cure of over \$5.7 million in pre-petition rent-defaults;

(e) Subordination of the valid pre-petition claims of affiliated creditors and equity holders as "insiders", in the amount of \$26,123,498 based upon classification;

(f) Payment of the Miami Center Limited Partnership's allowed claims using, *inter alia*, cash *without consent* and in the absence of consolidation, of separate, solvent non-debtor corporations related to Holywell Corporation as wholly-owned subsidiaries, without adhering to state corporation law and the bankruptcy court's "Cash Collateral Order"² requiring the payment of liabilities, including federal income taxes, prior to issuing a dividend to Holywell Corporation, the parent debtor stockholder;

(g) Dismissal with prejudice of the "Lender Liability Suit" by the trustee.

No provision was made for the repayment of court-authorized "super-priority" loans in the amount of \$4,717,404 plus accrued interest. No provision was made for the payment of federal income taxes to the Internal Revenue Service and state income taxes to the Commonwealth of Virginia in the estimated amount of \$20,763,841.

The Petitioners and others filed numerous objections to the confirmation of the Bank's proposed plan, citing, *inter alia*, the appointment of a "trustee" without satisfying the statutory requirements of 11 U.S.C. Section 1104(a) in whom powers and authority were granted

² Bkrcty., "Order on Emergency Motion to Treat Proceeds of the Sale as Cash Collateral, etc," December 31, 1984.

virtually identical to a "receiver," [i.e., Rule 201, Bankruptcy Act as amended to 1976] contrary to 11 U.S.C. Section 105(b); the lack of any basis for substantive consolidation or the subordination of affiliated creditors' claims; the absence of due process in the confiscation of non-debtors' property; and the proposed plan's inadequate means for implementation, particularly in not providing for the payment of federal and state income taxes, and "super-priority" loans authorized by the bankruptcy court.

A hearing on confirmation, as required by 11 U.S.C. Section 1128(a) was *scheduled* for April 29, 1985. However, when the parties convened on that date, the bankruptcy judge stated that he wished to postpone the hearing, without specifying a new date. The postponement proved to be permanent and, as the district court in another appeal of the Confirmation Order found,

"No confirmation hearing was held on the objections to the Bank's plan. Similarly, no hearing was held on the issues of subordination or classification of appellant's claims and interest . . . Finally no hearing was held regarding debtors' and [FF&E lessor's] objection that the Bank's plan was not fair and equitable." App. 149a; see fn. 4, p. 10, *infra*.

The only hearing concerning the plan was limited to the proposed substantive consolidation of the debtors' estates, held on July 23, 1985.

On August 8, 1985, the Bankruptcy Court entered its Confirmation Order [App. 123a], and without notice confirmed the Bank of New York's amended Plan of Reorganization. The confirmation hearing deferred on April 29, 1985 was not held. Numerous material pre-confirmation amendments were approved *ex parte*, including a stipulation with creditors' committees to revise and accelerate the "Effective Date" of the plan, so that instead of awaiting the determination of any claims of illegality on review, as originally proposed, the plan would be implemented immediately upon confirmation, if not

stayed. An order appointing Fred Stanton Smith as Trustee of the Miami Center Liquidating Trust was entered on August 12, 1985.

The Petitioners appealed the Confirmation Order and the Order Approving Substantive Consolidation immediately, and requested that the bankruptcy court stay implementation of the orders pending appeal. The Bankruptcy Court conditioned a stay upon the posting by the debtors of a bond, with surety, in the unobtainable amount of \$140 million, stating that final review should take no more than a year. In an emergency hearing on October 3, 1985, the district court "reduced" the bond to \$50 million, providing that such sum would only stay enforcement for 90 days.

When the October 10, 1985 deadline for the posting of the bond passed, despite direct knowledge of the appeal of the bankruptcy court's Confirmation Order and Order Approving Substantive Consolidation, the trustee immediately conveyed title of the Miami Center to the Bank of New York's designee, the Bank of New York having granted the trustee an Indemnity Letter holding him harmless for implementation of the plan's provisions. The Contract of Sale was amended to acknowledge that the trustee could only convey title to property of the debtors' estates in accordance with the Bankruptcy Code [Amended Contract of Sale, paragraph 25]. Notwithstanding the Confirmation Order's finding of fact that the Bank of New York's claim was undersecured, relying upon a provision of the plan granting unmatured interest to the closing of the Miami Center, the Bank took a credit for post-petition interest in an amount of \$27,050,115. The Closing Adjustments were deferred for 45 days and have not been competed yet. The Bank's designee still holds the property. A dismissal with prejudice was signed by the trustee to be filed in the "Lender Liability Suit." The trustee took possession and control of the Petitioners' assets and the aforementioned assets of non-debtor entities and immediately paid allowed cred-

itors' claims through Class 6, including post-petition interest.

The Petitioners' appeal to the district court specified numerous issues, including the lack of statutory authority for the consolidation and subordination features of the plan, the violation of constitutional separation of powers inherent in a Bankruptcy Court's dismissal of a lawsuit filed in the United States District Court, the violation of procedural due process in the failure to hold the statutorily mandated confirmation hearing, the appointment of a trustee without having satisfied the requirements of 11 U.S.C. Section 1104(a) and the substantive due process violations in the confiscation for private use of non-debtor's property. The Bank, however, argued that none of these issues should be reviewed on its merits by an Article III Court, and that the appeal was moot as a result of the plan's implementation.

The district court, on December 30, 1985, (App. 105a), rejected the Bank's mootness arguments and held that the Bank, as purchaser, was before the court, and a decision on the merits would affect the proceedings below. A genuine justiciable controversy existed and the court could fashion some relief if the plan were found to be illegal. In the same order, the district court found that the bankruptcy court had made no findings of fact sufficient to permit review on the issues of substantive consolidation and subordination, noting that "there seems to be a paucity of fact emanating from evidentiary hearings upon which the rulings should be founded" (App. 115a). The case was remanded.

On remand, the Bank indicated that no further hearings should be required and introduced no new evidence concerning substantive consolidation and equitable subordination at a limited evidentiary hearing held on January 18, 1986. The Bankruptcy Court's Order on Remand incorporated the Bank of New York's proposed findings of fact and conclusions of law by reference, ver-

batim and *in toto*, attaching a photocopy of what the bank was filed.³ App. 64a.

On March 20, 1986, citing *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985) the district court granted deference of the "clearly erroneous" standard of review [F.R.C.P. 52] to the Bank of New York's proposed findings of fact, adopted *in toto*, and affirmed the Confirmation Order and the substantive consolidation order. App. 35a. Shortly thereafter, United States District Judge Hoeveler ordered the dismissal of the "Lender Liability Suit," stating that it was an "administrative necessity" after affirmance of the Confirmation Order. App. 61a.

Petitioners filed a timely appeal of the district court's Order Affirming The Confirmation Order and Plan and the order dismissing the "Lender Liability Suit." The Bank of New York moved to dismiss the consolidated appeal on grounds of mootness, despite the fact that the plan continued to control the trustee's actions, the closing adjustments had not been consummated, and the Trust had more than \$17 million in cash. After hearing oral argument on the merits of the appeal, the Eleventh

³ The Bank of New York's proposed findings of fact pertinent to this petition for a writ of certiorari concerning the application of the mootness doctrine are as follows:

"53. . . . The Court finds that the \$255.6 million purchase price offered by the Bank for the project (including the FF&E) is fair and equitable, and is in the best interests of the creditors. The court further finds that the Bank is a good-faith purchaser."

"57. The court has now also had the unusual opportunity to observe the substantial consummation of the plan under evaluation (after the debtors failed to post the appeal bond on which a stay was conditioned.) The fairness, feasibility, and propriety of the plan have been verified . . . No stay is in effect, and the confirmed plan has been consummated"

"It is now legally and practically impossible to unwind the consummation of the Bank's plan or otherwise to restore the status quo before consummation."

Circuit's panel entered its opinion on June 29, 1987, dismissing the appeal as moot. App. 26a.⁴

The court cited previous decisions of the Eleventh Circuit⁵ which mandated a mootness determination when an order authorizing a sale to a "good-faith purchaser" is not stayed and substantial consummation precludes effective relief. The opinion ignored the district court's December 30, 1985 analysis (the factual situation had not changed in the interim) which noted that the property had *not* been sold to a third party "good faith purchaser," but rather to a designee of the Bank of New York itself. App. 121a.

Petitioners sought rehearing, whereupon the Court of Appeals entered an order on September 8, 1987, modifying its prior opinion to state that "petitioners are correct that neither the bankruptcy court nor the district court made an express or implied finding that the project was sold to a good faith purchaser." (App. 24a) The court, however, held the finding that the property was not sold to a "good-faith purchaser" did not affect the application of mootness, since the specific relief suggested by Petitioners would not have required reconveyance of the project.

The Bank of New York petitioned for rehearing of the September 8, 1987 modification and Petitioners filed a

⁴ Notwithstanding the fact that, in the piecemeal appellate process characterizing these proceedings, upon the Miami Center Joint Venture's appeal of the Confirmation Order's approving subordination of its claim and the taking of its property without consent, the district court *reversed* the Confirmation Order concluding that the plan of reorganization did not satisfy 11 U.S.C. Section 1129(b)(1) and was unfair and inequitable. S. D. Fla., *Olympia & York Florida Equity Corporation and Miami Center Joint Venture v. The Bank of New York*, Case No. 85-3230-CIV-ATKINS, March 24, 1987. App. 128a.

⁵ *In re Matos*, 790 F.2d 864 (11th Cir. 1986); *In re Sewanee Land, Coal & Cattle, Inc.*, 735 F.2d 1294 (11th Cir. 1984); and *Markstein v. Massey Assoc.*, 763 F.2d 1325, 1327 (11th Cir. 1985).

Suggestion of Rehearing In Banc. On March 10, 1988 (App. 1a), the Eleventh Circuit denied all motions for rehearing and rehearing in banc and vacated its September 8, 1987, order, again granting deference of the "clearly erroneous" standard of review to the Bank's proposed findings of fact and conclusions of law which had been adopted *in toto* by the bankruptcy court. In addition, however, the court ruled that the district judge had erred in his conclusion that the appeal should be considered on its merits and stated that the district court had "stood the application of the mootness doctrine on its head". [App. 16a]. The court of appeals vacated the district judge's March 20, 1986 affirmance order and directed that he dismiss the original appeals as moot.

On May 20, 1988, U.S. District Judge Aronovitz carried out the Eleventh Circuit's mandate, ordering the bankruptcy appeal dismissed as moot. (App. 156a). Meanwhile, although nearly three years has passed while Petitioners have steadfastly sought review of important legal issues, the trust still exists, the trustee still governs his actions by the confirmed plan and still holds over \$17 million in cash, and the closing is incomplete.

REASONS FOR GRANTING THE WRIT

In the administration of the Bankruptcy Reform Act of 1978 (11 U.S.C. § 101 et seq.), no order of a Bankruptcy Judge confirming a plan of reorganization should be, *per se*, immune from review on its merits, despite substantial constitutional objections to its entry. Yet the Eleventh Circuit Court of Appeals has, in effect, held below, in conflict with the decisions of other courts of appeals and of this Court, that such absolute immunity exists whenever a debtor cannot post a bond to stay the implementation of a plan proposed by his major creditor.

The Eleventh Circuit's application of the "mootness" doctrine denies appellate review on the merits as a matter of administrative convenience, (App. 18a-21a and 32a-

33a) and the court of appeals' ruling, if allowed to stand, would cause complete confusion in this fundamental part of bankruptcy administration. The holding would, indeed, render accurate the prescient the cynical comments made on the record by Chief Bankruptcy Judge Thomas C. Britton in an *ex parte* conference on May 15, 1987:

"... one great strength that the Bankruptcy Court has ... is that if an order of this Court is not superseded and that order is performed, then it cannot be challenged any further ... and if we had been able to carry out the entire plan very quickly, there would have never been an appeal because they couldn't post the bond."

"... one thing I have learned about the judicial apparatus and machinery, it is a great respecter of things that are done and things that work, no matter how screwed up they may be. Take the entire jurisdiction of this Court. The United States Supreme Court came out with a decision saying that only an Article III judge can do what these judges do and ... [replying to the statements of the Trustee's counsel that "they are doing the same thing they did then, in spite of the Supreme Court and in spite of Congress"] ... exactly, and if it goes back to the Supreme Court, without any question at all the Supreme Court's going to say it is okay, in other words, they will find a way to do it because it works" [Tr., May 15, 1987, App. 160a-162a]

Petitioners respectfully suggest that the foregoing philosophy is *not* the state of affairs intended by this Court in its landmark decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), and this Court should not allow the Eleventh Circuit Court of Appeals, in conflict with other circuits, to sanction it. Clearly the doctrine of mootness cannot be thus abused and this case represents the ideal opportunity for this Court to clarify its holdings as applied to this essential federal bankruptcy issue.

I. The Court Below Has Extended The Application of the Mootness Doctrine Far Beyond Limits Established By Other Circuit Courts of Appeal, and a Conflict Thus Exists Among the Circuits.

It is the absolute duty of every judicial tribunal to decide cases and controversies properly brought before it, by a judgment which can be carried into effect. U.S. Constitution, Art. III, *Mills v. Green*, 159 U.S. 651, 653 (1895). The concept of a court's relief from this duty when a case is said to be moot has nothing whatsoever to do with administrative difficulties which might flow from any given decision on the merits. Rather it is purely a reflection of Article III's requirement that a real "case or controversy" exists. This Court has enunciated the requirement as follows:

"To be cognizable in a federal court, a suit must be definite and concrete, touching the legal relations of parties having adverse interests . . . It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, *as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.*

North Carolina v. Rice, 404 U.S. 244, at 246 (1971), citing *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-241 (1937). [Emphasis supplied]

Thus, the essence of the doctrine of mootness is that it precludes merely advisory opinions but does not become a vehicle for avoiding the merits of difficult cases based upon administrative convenience, when the adverse parties are before the court and the state of facts is not hypothetical. Against this standard, consider the nature of the bankruptcy proceedings and the posture of the parties to the appeal below:

(1) A trustee appointed without satisfying applicable statutory requirements, delivered a deed, and the creditor (Appellee below) received property which its designee still holds. [App. 121a]

(2) No confirmation hearing had been held. 11 U.S.C. Section 1128(a). [App. 149a]

(3) No impaired class had accepted the plan, which was "crammed down" without a hearing. 11 U.S.C. Section 1129(b) (1)

(4) The plan did not provide "adequate means" for its implementation, no provisions having been made for the (a) repayment of "super-priority" loans authorized by the bankruptcy court,⁶ the payment of federal and state income taxes,⁷ and the payment of administrative expenses.⁸

(5) The plan's implementation involved taking of the property of private parties not subject to the bankruptcy court's subject matter jurisdiction to convey title to the Bank of New York's designee free and clear of liens.⁹

(6) The Plan included confiscation of the cash, in the amount of \$16,296,176, including earned interest, of non-filed solvent corporate entities as wholly-owned subsidiaries of a parent debtor in the absence of consolidation based upon a sham, alter-ego, or fraudulent transfer of assets and without satisfying state corporation law re-

⁶ *The Bank of New York v. Holywell Corporation, Theodore B. Gould, and Twin Development Corporation*, Appeal Case No. 87-0970-CIV-Kehoe.

⁷ *Bkcty., Fred Stanton Smith, as Trustee, etc. v. The United States of America, et al.*, April 28, 1988.

⁸ *Bkcty., Holywell Corporation, et al. v. Fred Stanton Smith, as Trustee, etc., and The Bank of New York*, May 12, 1988.

⁹ *Bkcty., The Bank of New York v. Olympia & York Florida Equity Corporation, O&Y Equity Corp., Theodore B. Gould, and Miami Center Joint Venture*, June 24, 1985; Affirmed S.D. Fla., June 23, 1986, No. 85-3430-CIV-ATKINS; and *Bkcty., Holywell Telecommunications Company, et al. v. The Bank of New York*, Memorandum Decision, September 27, 1985; affirmed S.D. Fla., No. 85-3431-CIV-KEHOE, April 24, 1987.

quiring the payment of liabilities prior to issuing a dividend to the parent stockholder.¹⁰

(7) The closing adjustments have not been consummated to this day and more than \$40 million is in dispute.¹¹

(8) The Confirmation Order's finding that the Bank of New York's claim was undersecured has been revised, for the purpose of granting a credit of post-petition interest in the amount of \$27,050,115 based upon a provision of the plan, contrary to 11 U.S.C. Sections 502(b)(2) and 506(b).¹²

Notwithstanding the clear controversy, the Bank moved for dismissal of the initial appeal on the grounds that its acquisition of the trustee's deed had rendered the appeal moot, and the court must never consider the merits of the case.

The district court, citing this Court's decisions and precedent of various circuit courts of appeal, found:

"The debtors' appeal is not a frivolous one and that, absent compelling cause, the interest of justice would best be served by allowing the appellants an opportunity to present their appeal from a fully developed record below . . . The property was sold *not* to a disinterested, third party purchaser, but to the appellee itself, through its designee . . . Today's opinion merely constitutes the court's determination that the appeal is a viable one, and that the court, should it determine that the appellants' requested relief, or other suitable remedy, is appropriate, would be able to grant it." [App. 122a]

¹⁰ *Twin Development Corporation v. Fred Stanton Smith, et al.*, Case No. 87-0037-C, W.D. Va., January 20, 1988.

¹¹ *Bkty., Fred Stanton Smith, as Trustee, etc. v. The Bank of New York, Miami Center Limited Partnership, et al.*, Adv. No. 87-0523.

¹² *Holywell Corp. et al. v. Smith et al.*, Appeal No. 88-0151-CIV-SMA.

The bankruptcy court having adopted *in toto* the Bank of New York's proposed findings of fact (without satisfying Fed. R. C. P. Rule 52(a), as adopted in Bankruptcy Rule 7052), that (a) the Bank of New York was a "good faith purchaser," (b) substantial consummation precluded effective relief, (c) the plan was fair and equitable, and (d) the plan's provisions were not contrary to applicable statutory requirements, the Eleventh Circuit has applied the "clearly erroneous" standard of review, citing *Anderson v. City of Bessemer City, supra*, granting deference to the above findings as the basis for the application of the "mootness" doctrine to appellate review of the merits in this case. [App. 9a]

The court of appeals has said the merits of this controversy cannot be reviewed, and that the district court committed error in concluding that he could do so; this, in spite of the fact that (a) the property was purchased not by a third party, but by the Appellee/Bank itself, *while it was a party* to the appeal; (b) the Petitioners have steadfastly maintained their claims as to the illegality of the "crammed down" plan, even while submitting to the Bankruptcy Court's confirmation order, as they must; (c) the specific relief requested by Petitioners in the appeal to the Eleventh Circuit adversely affects no one who is not a party to the appeal; and (d) serious issues of due process deprivations, separation of powers and property rights evade review. Thus, in the Eleventh Circuit, the rule of law is that no debtor unable to (and what debtor ever *could*) post a multi-million dollar supersedeas bond can have his case reviewed on the merits, no matter how flagrant may be the illegalities of a creditor's plan.

Other circuits having had occasion to consider an argument for the application of mootness to an unstayed confirmation order and transfer of property in a bankruptcy proceeding clearly would not have abandoned their duty to decide this case on its merits. The court below, seemingly less cognizant than these other circuit

courts of the basis of and limits on the use of mootness to avoid the merits, has created a palpable conflict among the circuits, of fundamental importance to the proper administration of this nation's bankruptcy laws.

The Ninth Circuit Court of Appeals reflects the most direct and irreconcilable conflict with the court below; indeed, the Ninth Circuit has expressly declared it. In the very recent case of *In Re Sun Valley Ranches, Inc.*, 823 F.2d 1373 (9th Cir. 1987), the court considered the appeal of an order authorizing the sale of real estate. As here, a stay pending appeal had been denied because the debtor could not post a bond satisfactory to the bankruptcy court, and the lender purchased the property. The lender/purchaser then moved to dismiss the appeal on the ground that the "sale has occurred and the court can therefore offer no effective relief." 823 F.2d at 1374.

The Ninth Circuit in *Sun Valley Ranches* held that the appeal was not moot, because the property, as in the case at bar, had been sold to a creditor who is a party to the appeal. The court noted the Ninth Circuit's line of cases refusing to moot a debtor's subsequent appeal when the creditor-purchaser was before the court as a party to the appeal [*Matter of Springpark Associates*, 623 F.2d 1377 (9th Cir.) cert. denied, 449 U.S. 956 (1980) and *Matter of Cada Investments, Inc.*, 664 F.2d 1158, 1160 (9th Cir. 1981)]. Most significantly, the court then stated: "We decline to follow the Eleventh Circuit's contrary position." 823 F.2d at 1375.

In thus openly declaring this irreconcilable conflict between the circuits the *Sun Valley Ranches* court referred expressly to the very Eleventh Circuit decisions of *In re Matos*, 790 F.2d 864, 866 (11th Cir. 1986) and *In re Sewanee Land, Coal & Cattle, Inc.*, 735 F.2d 1294, 1296 (11th Cir. 1984) which the court below has relied upon in its decision that Petitioners' consolidated appeals are moot.

The Ninth Circuit has also consistently held that the result is not different when the appeal is of the order confirming a plan of reorganization, so long as all essential parties are before the court and a genuine controversy continues to exist. *In Re Technical Knockout Graphics, Inc.*, 833 F.2d 797 (9th Cir. 1987) (noting that a plan's provision "does not guarantee the plan will succeed" 833 F.2d at 801). See also *Matter of Combined Metals Reduction Co.*, 557 F.2d 179, 194-5 (9th Cir. 1977).

Thus, on this basis alone, this case is ripe for resolution by this Court. Both debtor-owners of real property as well as creditor-purchasers need to know whether a bankruptcy court order authorizing a sale (where both are parties to the appeal) has become immune from any review of its merits.

The Ninth Circuit is not the only circuit court of appeals which has declined to extend the application of the mootness doctrine as the court below did in this case. The Fifth Circuit Court of Appeals recently considered, in *Matter of Latham*, 823 F.2d 108 (5th Cir. 1987), the case of a bankruptcy court order requiring that a debtor's trust assets be turned over for sale to satisfy a bank's judgment. When no stay of the order was obtained, the bank sought a determination that the trustee in bankruptcy's appeal was moot. Citing this Court's decision in *Cahill v. New York, New Haven & Hartford R. Co.*, 351 U.S. 183 (1956), the court held that the appeal was not moot, stating:

"Satisfaction of a judgment does not moot the appeal unless the defendant appellant voluntarily satisfies the judgment, thereby misleading the plaintiff into believing the controversy has ended . . . In this case the judgment was satisfied by Texas National [the trust fund holder], not the appellant, the trustee in bankruptcy. Plaintiff Bank could not have been misled into believing the controversy was over because the trustee in bankruptcy was still pursuing

the appeal. Although changes in circumstances could cause difficulties, the payment of an erroneous judgment certainly can be recovered. This appeal is not moot." 823 F.2d at 111.

The Eleventh Circuit's deviation from this Court's line of cases including *Cahill, supra*, is more fully developed in the second section of this petition. However, the *Latham* case illustrates that the Fifth Circuit has kept the origins and basis of the mootness doctrine in perspective, as contrasted to the abuse of that doctrine by the court below. See also *In Re Louisiana World Exposition, Inc.*, 832 F.2d 1391 (5th Cir. 1987).

In light of the importance attached by the court below to the notion of "substantial consummation" of the plan, the decision of the Tenth Circuit Court of Appeals in *Matter of King Resources Co.*, 651 F.2d 1326 (1980) is highly illuminating and underscores a further conflict between the circuits. In *King*, an order confirming a plan of reorganization was appealed but not stayed. Appellees argued that the appeal was moot and, in the manner of the Appellee Bank below, cited steps taken in consummation of the plan. The court had no trouble in turning to the merits of the appeal and denying the mootness arguments. Quoting with approval the Ninth Circuit's opinion in *Combined Metals, supra*, the Tenth Circuit court stated:

"If we were to conclude that the appellant is correct, and the plan was erroneously confirmed by the district judge, then a decision to that effect could have some effect on the proceedings below. While much of the debtor's property has been liquidated, and many of the creditors have been paid, *the plan still controls the actions of the trustee . . .* As a result, we are of the opinion that the order of confirmation is not moot, and we will consider the merits of this issue below.' Thus we cannot say that a decision that the plan was erroneously confirmed could not have some effect on the proceedings below, *even if it could not undo all that has taken place.*"

651 F.2d at 1322. Thus, quite clearly, the Tenth Circuit, if faced with the present appeal of a plan which to this day "still controls the actions of the trustee" created thereunder (see App. 145a), would not have avoided, by invoking mootness, the serious constitutional and statutory issues raised on appeal. The District of Columbia Circuit has made an equivalent ruling in *In re AOV Industries, Inc.*, 792 F.2d 1140, 1149 (D.C. Cir. 1986).

It should also be noted that while the Fourth Circuit Court of Appeals has recently ruled, in *Central States, etc. v. Central Transport, Inc.*, 841 F.2d 92 (4th Cir. 1988), that a particular appeal of an unstayed confirmation order was moot because the relief "would require the undoing of financial transactions involving third parties, not participants in this litigation," the opinion nevertheless reflects conflict with the Eleventh Circuit's *per se* application of the mootness doctrine. The court in *Central States* cites *AOV Industries, Inc.*, *supra*, and *King Resources Co.*, *supra*, agreeing that "orders confirming plans of reorganization do not become immune from appellate review upon their partial, or even substantial, implementation." 841 F.2d at 96.

The opinion in *Central States* also clearly suggests that the court would not have dismissed on mootness grounds (a) if the appellants had made some effort to obtain a stay and not "sat idly by while this case drifted along a routine, unexpedited course" 841 F.2d at 95 and (b) if the relief requested did not involve an adverse effect on third parties who were not parties to the appeal. 941 F.2d at 96.

As was repeatedly pointed out to the court below, the Petitioners have not sought relief in this appeal which adversely affects *any* third party. That relief involved redistribution of the sale proceeds derived from the Bank's \$255.6 million purchase in accordance with proper legal priorities and reversal of illegally imposed substantive consolidation of separate entities and subordination of non-filed affiliated creditors, *without* disturbing a sin-

gle penny of the third party creditors whose claims, with full post-petition interest, were paid by the trustee. In addition, the requested relief included reversal of the forced dismissal by the plan's trustee of the United States District Court RICO and usury action filed against the Bank. The statement of the court below that Petitioners sought to have "the property revalued to a higher figure and the sale price adjusted accordingly" [App. 18a] is simply an inaccurate representation of Petitioners' appeal.

The review of mootness, and its application to the administration of reorganization proceedings under the Bankruptcy Code, which has been adopted by the Eleventh Circuit Court of Appeals in this case, stands in stark relief to the carefully limited applications prevailing in other circuits. The confusion which has resulted should be relieved by this Court, through issuance of a writ of certiorari.

II. The Application of Mootness by the Court Below Is In Direct Conflict With Principles Established by This Court and Threatens to Cloud Those Principles in The Area of Bankruptcy Administration.

A. Compliance with a court order while seeking reversal does not moot the appeal.

To the extent that the Bank's confirmed Plan has been partially implemented as the result of the lack of a stay pending appeal [the result of the revision of the "Effective Date" and the Bankruptcy Court's conditioning a stay upon a \$140 million supersedeas bond], it has been a consequence of the Petitioners' submitting, as they must, to the judgment of the Bankruptcy Court confirming the Plan, and not taking illegal actions to thwart that judgment, while steadfastly seeking its reversal or modification on appeal. It is a rule of law, set forth in numerous decisions of this Court, that by staying within the bounds of the law, appellants do not thereby lose their right to seek reversal or modification on appeal. There remains a real "controversy" between litigants, within

the ambit of Article III, Section 2, of the United States Constitution, and the federal appellate courts must face the merits of the appeal. *Dakota County v. Glidden*, 113 U.S. 222, 224 (1885); *Bakery Drivers v. Wagshal*, 333 U.S. 437 (1948); *Mancusi v. Stubbs*, 408 U.S. 204 (1972).

Justice Rehnquist delivered the opinion in *Mancusi*, as follows:

Much earlier the Court had stated a similar view of mootness in these circumstances. 'There can be no question that a debtor against whom a judgment for money is recovered may pay that judgment and bring a writ of error to reverse it, and if reversed can recover back his money. And a defendant in an action of ejectment may bring a writ of error, and failing to give a supersedeas bond, may submit to the judgment by giving possession of the land, which he can recover if he reverses the judgment by means of a writ of restitution. In both cases the defendant has merely submitted to perform the judgment of the court, and has not thereby lost his right to seek a reversal of that judgment by writ of error or appeal.' [citing *Dakota County v. Glidden*, *supra*]

Under these authorities the case is not moot, and we turn to the merits. 408 U.S. at 207.

In similar precedents, this Court has established that the cessation of activities or conduct which would be contrary to a court's order 'does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot.' *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953); *Gray v. Sanders*, 372 U.S. 368, 376 (1963); *United States v. Phosphate Export Ass'n.*, 393 U.S. 199, 202-203 (1968) [re-affirmed by this Court in *DeFunis v. Odegaard*, 416 U.S. 312, 316-317 (1974)]

Quite clearly, the decision of the court below is that this appeal is moot by virtue of the fact that the appellants have submitted to the order while seeking redress on appeal. As such, that decision, applying mootness in

this case, puts the Eleventh Circuit Court of Appeals in direct conflict with the above-cited decisions of this Court.

A landmark decision in which this Court considered the issue of mootness was *Roe v. Wade*, 410 U.S. 113 (1973), involving, on its merits, the issue of a constitutional right to privacy and the legality of statutes prohibiting abortion. When the appellees in that case argued that the appeal was moot because the particular pregnancy at issue had previously terminated, Justice Blackmun responded:

. . . the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial state, and appellate review will be effectively denied. *Our law should not be that rigid.* 410 U.S. at 127 [Emphasis supplied]

The distinct echoes of the appellee's mootness argument in *Roe v. Wade* may be heard in the cynical sentiments expressed by the Bankruptcy Judge in this case, and set out on page 12 hereof:

" . . . one great strength that the Bankruptcy Court has . . . is that if an order of this Court is not superseded and that order is performed, *then it cannot be challenged any further* . . . and if we had been able to carry out the entire plan very quickly, there would have never been any appeal because they couldn't post the bond." [App. 160a]

The Eleventh Circuit should not have placed itself in the position of sanctioning such a view, in direct contradiction of this Court's decisions.

B. Mootness is not an appropriate device to avoid questions of due process violations.

A salient portion of Petitioners' appeal on the merits in this case is based upon the assertion that the bankruptcy court's judicial conduct was violative of both the

substantive and procedural due process requirements of the Fifth Amendment of the Constitution. The decision of the court below has precluded review of those issues on the merits by relying on mootness. Indeed, it has been held in the Ninth Circuit that the doctrine of mootness is not appropriate as a basis to let stand an order which is void under the due process clause of the Fifth Amendment. *In re Blumer*, 66 B.R. 109 (9th Cir. BAP 1986), citing *In re Center Wholesale, Inc.*, 759 F.2d 1440, at 1449 (9th Cir. 1985).

More importantly, however, that principle is in accord with the decisions of this Court, which clearly hold that the procedures, proceedings, and powers of the Bankruptcy Court are subject to due process under the Fifth Amendment. *United States v. Security Industrial Bank*, 459 U.S. 70, 103 S.Ct. 407, 74 L.Ed. 2d 235 (1982); *Holt v. Henley*, 232 U.S. 637, 34 S.Ct. 459, 58 L.Ed. 767 (1914). The decision below would sanction the denial of due process without the possibility of appellate review upon the merits.

In *DeFunis v. Odegaard*, *supra*, this Court recognized that if the issue had been the constitutionality of the law school's admissions procedures, the case would not have been moot. 416 U.S. at 317 (citing *United States v. W. T. Grant Co.*, *supra*, and the precedents cited above). The *DeFunis* case would then have been analagous to Petitioners' appeal. In *DeFunis*, the appeal was moot *solely* because the appellant law student had gotten *everything* he was requesting on appeal, since he was about to graduate, contrary to the complete denial of relief thus far accorded your Petitioners. Justice Brennan's dissent in *DeFunis* is appropriate in considering the effect of the Eleventh Circuit's mootness rationale in the face of constitutional due process issues:

. . . I can thus find no justification for the court's straining to rid itself of this dispute. While we must be vigilant to require that litigants maintain a personal stake in the outcome a controversy to assure

that 'the questions will be framed with the necessary specificity, that the issues will be contested with the necessary adverseness, and that the litigation will be pursued with the necessary vigor to assure that the Constitutional challenge will be made in a form traditionally thought to be capable of judicial resolution,' *Flast v. Cohen*, 392 U.S. 83, 106, 88 S.Ct. 1942, 1955, 20 L.Ed. 2d 947 (1968), there is not want of an adversary contest in this case . . . The case is thus ripe for decision on a fully developed factual record, with sharply defined and fully canvassed legal issues. cf. *Sibron v. New York*, 392 U.S. 40, 57, 88 S.Ct. 1889, 1899, 20 L.Ed. 2d 917 (1968).

Moreover, in endeavoring to dispose as moot, the Court clearly disserves the public interest. The Constitutional issues which are avoided today concern vast numbers of people . . . Although the Court should, of course, avoid unnecessary decisions of Constitutional questions, we should not transform principles of avoidance of constitutional decisions into devices for sidestepping resolution of difficult cases. 416 U.S. at 349.

C. This Court has affirmatively revoked as illegal an unstayed property abandonment order subsequent to completion of the abandonment, and expressed no duty to evade the merits on mootness grounds.

A 1986 decision of this Court is demonstrative of the degree to which the mootness doctrine has been misapplied by the court below. In *Midlantic National Bank v. New Jersey D.E.P.*, 474 U.S. 494 (1986), a bankruptcy judge had entered an order approving an abandonment of a debtor's property over objection by the state that such abandonment posed a public health hazard and was therefore beyond the statutory power of the bankruptcy court to authorize. While the order was appealed by the state, no stay was obtained and the trustee completed the abandonment of the property. Meanwhile, the district court affirmed the order and the Third Circuit Court of Appeals reversed, thus *revoking* the abandonment order

after considering the merits of the illegality claims. A petition for certiorari was filed after the passage of nearly three years from the property abandonment.

Clearly, under the rationale and philosophy of the Eleventh Circuit in the case at bar, the appeal in *Midlantic* would have been quickly dismissed as moot, despite the importance of the substantive issues. However, this Court granted certiorari, went right to the merits of the appeal and revoked the unstayed and completely implemented abandonment order, declaring that "the Bankruptcy Court does not have the power to authorize an abandonment without formulating conditions that will adequately protect the public's health and safety." 474 U.S. at 507.

Indeed, even the strongly worded dissent of four justices in the *Midlantic* case did not suggest that the Court's power to decide the case was lost to mootness. The dissenters would have reversed the Third Circuit on the merits, thus making this Court unanimous in considering the matter a genuine justiciable case and controversy.

At least one United States District Court has relied upon the *Midlantic* case as binding precedent for it and all federal courts on the issue of whether the failure to obtain a stay of a bankruptcy court's order authorizing a property abandonment dictates a dismissal of the appeal as moot. The court in *In Re Smith-Douglas, Inc.*, 73 B.R. 550 (E.D.N.C. 1987) stated:

The United States Supreme Court has revoked a non-stayed abandonment order. This court must follow the Supreme Court's precedent.

The appellees argue that this court should not consider the Supreme Court's action binding on it because the question of mootness was not raised by the parties in the *Midlantic* case. This argument is not convincing. The question of mootness is always before a federal court. The Supreme Court has

stated that the question of mootness must be resolved even though it is not raised by the parties because the issue implicates the court's jurisdiction. *St. Paul Fire & Marine Insurance Co. v. Barry*, 438 U.S. 531, 537, 98 S.Ct. 2923, 2927, 57 L.Ed.2d 932 (1978). The Supreme Court's failure to dismiss the *Midlantic* case on grounds of mootness is binding on this court. Accordingly, the appellees' motion to dismiss is denied.

73 B.R. 550 (E.D.N.C. 1987)

There is, of course, no essential difference between a court's power to decide important substantive issues of the legality of a long-implemented property abandonment order and that same power, *a fortiori*, with respect to an unstayed confirmation order under which a property transfer to the Appellee occurred. Petitioners submit that the *Smith-Douglas* court was correct and that the *Midlantic* case should have constituted binding precedent on both the district court and court of appeals below.

In any event, the uncertainty in the area of bankruptcy law regarding the principles established by this court in its decisions on the scope of the mootness doctrine is evident. In the case of the court below, there was a clear deviation from those principles and this case constitutes an appropriate opportunity for the Court to re-affirm them and provide certainty and uniformity in the reorganization process.

III. The Mootness Determination of the Court Below Has So Far Sanctioned a Departure From Proper Legal Proceedings by a Lower Court. As to Call For An Exercise of this Court's Power of Supervision.

In the landmark decision of *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), this Court struck down the 1978 Bankruptcy Reform Act as creating an unconstitutional exercise of judicial power by a non-Article III bankruptcy judge.

Since that decision, both Congress and the federal courts have solemnly undertaken to evolve a legislative structure and judicial practice which will achieve effective administration without running afoul of fundamental constitutional guarantees.¹³ Therefore, one can imagine the Petitioners' shock five years after that decision to obtain the record transcript of the bankruptcy judge's views of that difficult process and this Court's *modus operandi*:

THE COURT: Well, one thing I have learned about the judicial apparatus and machinery, it is a great respecter of things that are done and things that work, no matter how screwed up they may be. Take the very question of the entire jurisdiction of this Court. The United States Supreme Court came out with a decision saying that only an Article 3 judge can do what these judges do and, as Irving and I know, today, three years, four years later—

[TRUSTEE'S COUNSEL]: They are doing the same thing they did then in spite of the Supreme Court and in spite of Congress.

THE COURT: —exactly, and if it goes back to the Supreme Court, without any question at all the Supreme Court is going to say it is okay, in other words, they will find a way to do it because it works, it works, and so we have got to make it work. We can't eliminate controversies, we can't eliminate the personalities that are involved—they sure are a problem.

[Transcript May 15, 1987, App. 161a-162a]

What "works," of course, is the notion in the bankruptcy judge's previously quoted remarks from this same

¹³ Indeed, this Court has in recent terms granted certiorari in several cases underscoring the importance of relieving the uncertainty in interpretation of the present Bankruptcy Code. See, e.g., *United Savings Association of Texas v. Timbers of Inwood Forest*, — U.S. —, 108 S.Ct. 626 (1988), *Midlantic National Bank*, *supra* (1986), and *In re Ron Pair Enterprises Inc.*, cert. granted, — U.S. —, 108 S.Ct. 1218 (1988).

ex parte transcript (p. 12, *supra*) that the plan could not be challenged if carried out quickly enough, since a debtor cannot post a bond. One month later the court of appeals effectively sanctioned the bankruptcy judge's views (as well as the flagrant abuses in the confirmation procedures) by dismissing the appeals as moot based upon the failure to post the \$50 million supersedeas bond.

It is respectfully submitted that this Court's supervisory powers cannot be more appropriately exercised than to quell such a mockery of its *Northern Pipeline* decision, undermining the serious striving of legislators, jurists and bankruptcy practitioners across the nation to create an effective bankruptcy system which respects this Court's enunciated constitutional principles.

CONCLUSION

For the foregoing reasons, this Court should grant the writ and reverse the decision of the court below.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

Nos. 86-5286, 86-5386

MIAMI CENTER LIMITED PARTNERSHIP,
MIAMI CENTER CORPORATION,
THEODORE B. GOULD, CHOPIN ASSOCIATES, and
HOLYWELL CORPORATION,
Plaintiffs-Appellants,
v.

BANK OF NEW YORK,
Defendant-Appellee.

MIAMI CENTER CORPORATION and CHOPIN ASSOCIATES,
Plaintiffs-Appellants,
v.

BANK OF NEW YORK, *et al.,*
Defendants-Appellees.

March 10, 1988

Before ANDERSON, Circuit Judge, SWYGERT* and
GODBOLD**, Senior Circuit Judges.

* Honorable Luther M. Swygert, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation. Judge Swygert did not participate in the consideration of these petitions. This order is entered by a quorum. See 28 U.S.C. § 46.

** See Rule 34-2, Rules of the U.S. Court of Appeals for the Eleventh Circuit.

**ON PETITION FOR REHEARING AND REHEARING
EN BANC BY APPELLANTS AND PETITION FOR
REHEARING BY APPELLEES**

(Opinion June 29, 1987, 11 Cir., 820 F.2d 376)

GODBOLD, Senior Circuit Judge:

On petition for rehearing by appellants/debtors we entered an order on September 8, 1987, 826 F.2d 1010 (11th Cir. 1987), in which we attempted to correct what we believed was an error in our opinion, 820 F.2d 376 (11th Cir. 1987). In this order we reaffirmed our conclusion that these consolidated appeals should be dismissed and denied appellants' petition for rehearing. Subsequently the appellants/debtors filed a petition for rehearing en banc, and the appellees filed a petition for rehearing with respect to the September 8 order.

It now appears that our correction was wrong. We have, therefore, gone back to square one and have reviewed the record and the numerous briefs. There are two appeals before us. No. 86-5286 is an appeal from an order of the district court entered in an appeal to it affirming two orders of the bankruptcy court. This appeal to us is the primary subject of this opinion. We hold that the district court should have dismissed the appeal to it as moot, and we remand to the district court with instructions that it do so. No. 86-5386, a related case, is an appeal to us from an order of the district court dismissing a civil action for damages brought in the district court by the debtors in No. 86-5286 against the major creditors. Our disposition of this appeal is controlled by our decision in No. 86-5286. In No. 86-5386 we affirm the district court's dismissal.

The appellants are five Chapter 11 debtors—an individual debtor, Theodore B. Gould, and four other debtors owned, controlled, or dominated by Gould. All have been involved in development of the Miami Center project, a modern thirty-five story hotel and office building

structure, joined by a restaurant and shopping complex, plus a parking garage, situated at a bay-front site in downtown Miami, Florida. The Bank of New York financed the construction of the project and is the principal debtor. Its mortgage fell into default, and it began foreclosure. The five debtors filed voluntary petitions for bankruptcy, and the bankruptcy court consolidated the estates. The debtors continued in possession.

The debtors and the bank filed competing reorganization plans. The creditor committees and individual creditors overwhelmingly approved the bank's amended plan and rejected the debtors' plans. The bank's amended plan included a proposal that the estates of the five debtors be consolidated. The bankruptcy court entered two orders that are central to No. 86-5286. On July 23, 1985 it approved substantive consolidation of the debtors' estates and overruled debtors' objections to that aspect of the reorganization plan. The court noted:

The consolidation of the five estates is for the purpose of allowing all available funds and assets of the estates to be used in accordance with the Bank's Amended Plan, if confirmed, to pay all allowed creditor's [sic] claims.

The court reserved consideration of whether all other aspects of the reorganization plan entitled it to confirmation.

On August 8, 1985 the bankruptcy court considered whether to confirm the debtors' plans or the bank's plan. The debtors' major objections to the bank's plan were, first, that the assets were worth substantially more than the bank was willing to pay. Second, the Gould interests objected to the provision for consolidation of estates that had been approved in the July 23 order. The court rejected debtors' plans and approved the bank's. In its order, reported as *In re Holywell Corp.*, 54 B.R. 41 (Bkrctcy. S.D.Fla.1985), it noted that an application for rehearing

and reconsideration of the July 23 order was pending; the court denied the application for rehearing.

Under the amended reorganization plan that was confirmed a liquidating trustee would be appointed and would take charge of the property. The Bank of New York would acquire the Miami Center property from the trustee, together with the furniture, fixtures, and equipment therein, for \$255,600,000, a valuation based upon an MIA appraisal.¹ This purchase would be funded through cancellation of the judgment lien held by the bank (approximately \$240 million)², plus any new cash necessary to come up to the \$255.6 million figure. In addition, the bank agreed to release to the trustee \$30 million realized from the sale of unrelated property located in Washington, D.C. that had been owned by some of the debtors; this cash was additional collateral held by the bank and subject to its lien.

Moreover, the bank was required to set aside \$14 million, backed by surety bonds, to protect the rights of creditors affiliated with Gould, who had been found in a separate order to be lessors of equipment and fixtures located in Miami Center that had been included with the sale to the bank. This order was the subject of a separate appeal. Should the bond ultimately have to pay the lessors for the FF & E under this arrangement it would be entitled to seek reimbursement from the estate pursuant to a trustee's certificate.

Also the plan provided that certain creditors affiliated with the Gould interests would be "equitably subordinated" to claims of other creditors with lower priority because these Gould-affiliated creditors were "insiders."

¹ The furniture, fixtures and equipment had been obtained from affiliates of the debtors pursuant to what the district court, in a separate order, had found to be leases.

² In separate proceedings the principal and interest due under the mortgage had been established, and the bank had been granted a final judgment for these amounts.

The debtors had filed in the U.S. District Court a separate suit for damages charging that in connection with its loan the bank had committed fraud and various RICO violations. The approved reorganization plan provided that this case, which the bank asserted was a chose in action of the bankruptcy estate and thus due to be under the control of the trustee, was to be dismissed by the trustee.

Debtors moved in the bankruptcy court for a stay of the confirmation order pending appeal. After a hearing the bankruptcy court granted a stay conditioned upon debtors posting a bond in the amount of \$140 million, based upon the court's estimate that an appeal would take a year. In October 1985, on review, the district court reduced the amount of the bond to \$50 million, on the assumption an appeal could be expedited and determined in 90 days, and required the bond be filed by October 10, 1985. The debtors appealed the bond ruling to this court, which dismissed for lack of jurisdiction. The debtors did not post a bond, and, beginning October 11, 1985, the trustee and the bank set about immediately to consummate the reorganization plan as approved. The trustee conveyed to the bank's designee, a land trust, title to Miami Center and its furniture, fixtures and equipment. The bank gave up its judgment lien, and, in addition, paid approximately \$13.6 million of new money, to make up the total consideration of \$255.6 million. Also, it released the \$30 million of additional cash collateral. The trustee began making payments to 400-plus creditors of the five estates.

On appeal to the district court the debtors attacked the consolidation order and the confirmation order. They asserted that: the necessary bases for the consolidation order were not proved; various of their claims were improperly subordinated to claims of general creditors; the bankruptcy court failed to have a hearing on valuation; the reorganization plan improperly required the trustee

to dismiss the separate suit filed by debtors in the federal district court; the reorganization plan discriminated against mechanics and materialmen and some unsecured creditors; and the bankruptcy court denied debtors' due process.

In November 1985 the bank and the trustee moved to dismiss the appeal to the district court as moot because no stay of the reorganization plan had been obtained.

The district court (Sidney M. Aronovitz, D.J.) held that the consolidation and confirmation orders were "intertwined and independent" and that the order approving the plan of reorganization "includes inferentially the the effect of the [earlier] Order of Substantive Consolidation." With respect to both orders, however, the court held that the bankruptcy court had failed to enter sufficient findings of fact and sufficient explanations of its legal reasoning to support adequate appellate review. The court remanded the matter to the bankruptcy court with directions for it:

to schedule and to hold such further adversarial hearings and to make and enter such findings of fact and conclusions of law as are necessary to provide this Court with an adequate basis to decide the instant appeal on the merits.

Order, p. 12.

Despite its conclusion that there were insufficient findings to support appellate review, the court proceeded to address the appellees' motion to dismiss the appeal for mootness.³ It looked to the mootness doctrine formerly stated in Bankruptcy Rule 805:

Unless an order approving a sale of property or issuance of a certificate of indebtedness is stayed

³ The trustee had filed a mootness motion but was not a party to the appeal.

pending appeal, the sale to a good faith purchaser or the issuance of a certificate to a good faith holder shall not be affected by the reversal or modification of such order on appeal whether or not the purchaser or holder knows of the pendency of the appeal.

It noted that although the mootness standard was not carried forward in Rule 8005, which supplanted Rule 805 in 1983, it is widely accepted in case law, including *In re Sewanee Land, Coal & Cattle, Inc.*, 735 F.2d 1294 (11th Cir.1984). Relying upon a Ninth Circuit case, *Matter of Combined Metals Reduction Co.*, 557 F.2d 179 (9th Cir. 1977), the court held that where a debtor appeals from several orders, some of which are orders approving the sale of property, and fails to obtain a stay, the debtor may proceed with the appeal of orders not involved in the sale. Applying this principle, the district court concluded that the appeal of the consolidation order was not moot because it was not an order of sale, and because, after remand, should it [the district court] rule in favor of debtors on their appeal of the consolidation order, the court could grant meaningful relief to them by reversing that order and "that portion of the confirmation plan of reorganization which incorporates this order." Order, p. 15. Therefore, it held that it would decide the validity of the consolidation order on the merits after receipt of findings of fact and conclusions of law that it ordered entered by the bankruptcy court.

The court then turned to the confirmation order. It did not address the status of the bank as a good faith purchaser within the meaning of the mootness cases. Nor did it speak to its holdings that the consolidation order, though standing alone was not an order approving the sale of property, was an order "involved with the sale" and indeed was "intertwined and interdependent." Rather, as appears from the portions of its order quoted below, the court noted that the purchaser was a designee of the bank and within its jurisdiction, and it analyzed its

ability to give "effective relief" by considering whether it was capable of undoing what had been done. The court stated that it could reverse its subordination of debtors' claims and return them to their pre-confirmation status; it could require the trustee to reinstate the separate suit that debtors had filed; and it could review alleged procedural flaws in the valuation proceedings leading up to confirmation and in other unspecified proceedings. The court put its finger on the central dispute:

This appeal is primarily directed at recovering title to the Miami Center property held by the bank's designee and obtaining review of the bankruptcy court's substantive rulings noted above [the rulings in the confirmation order].

Ms. Op. p. 17.

As to this central matter, the court held:

[S]hould this court decide the substantive appeal before it in the appellants' favor, the sale of the Miami Center, and its equipment and fixtures, could be undone.

Id. at p. 18.

* * *

Although the Miami Center is now held by the Bank's designee, it is still in the effective possession of the Bank which, as appellee in this matter, is under the jurisdiction of the court. Should this court decide, after reviewing the findings made by the court below on the remand, that the entire plan of reorganization was erroneously approved, it could fairly order the transfer of the Miami Center property back to the debtors, on the condition that those funds taken from the Thirty Million (\$30,000,000) Dollars collateral for payment to creditors remain undisturbed or be applied in behalf of debtors. The Bank of New York would be returned to its position as chief secured creditor, and could either propose a different plan of

reorganization before the bankruptcy court or pursue remedies available to it as mortgagee. The appellants would be returned to the status of debtors in possession of the property, and could likewise attempt to obtain creditor approval for an alternate plan while seeking a buyer for the Miami Center which would be willing to pay what the debtors contend is the property's true value.

Id. at pp. 18-19.

Upon application by the bank the district court certified to this court under 28 U.S.C. § 1292(b) the issue of whether the appeal to it was moot. This court declined to accept the case.

On remand, on the consolidation issue, the bankruptcy court conducted a hearing, took evidence, and heard argument. On the confirmation issues it invited evidence. None was tendered except on valuation and calculation of the amount of the bank's lien.

The bankruptcy court entered lengthy findings and conclusions,⁴ which included:

1. Holdings rejected the debtors' reorganization plans because, among other reasons, the debtors had

⁴ In this court, as in the district court, the debtors question the bankruptcy court's having adopted *in toto* proposed findings and conclusions submitted by the bank. The bankruptcy judge asked, and received, proposed findings from the debtors and from the bank. He adopted those from the bank. Debtors question this procedure (as has this court, *Cabriolet Porsche-Audi, Inc. v. American Honda Motor Company*, 773 F.2d 1193, 1198 n. 2 (11th Cir. 1985)), but this does not render the findings and conclusions invalid. *Anderson v. Bessemer City*, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985). The district court examined the findings under the plainly erroneous rule and affirmed them. We review them as relevant to the mootness issue. Examining them in that constricted scope, we find no error.

no buyer and they were in litigation on nearly every front.⁵

2. Elaborate findings on relations between the debtors that supported the requirement of consolidation.

3. Detailed findings of improprieties involving the Gould interests that justified subordination of various of the Gould-related claims.

4. As to valuation, that under one approach debtors' valuation was higher than that of the MIA appraiser presented by the bank but the debtors had produced no purchaser willing to pay the higher figure, and that under another approach the valuations of debtors and the MIA appraiser were very near the same.

Following these findings and conclusions the court held:

Based upon all of the foregoing, the Court finds that the \$255.6 million purchase price offered by the Bank for the Project (including the FF & E) is fair and equitable, and is in the best interest of the creditors. The Court further finds that the Bank is a good faith purchaser.

With respect to the separate suit, the court found it had no significant value because debtors had executed releases as to transactions between them and the bank; rather the suit was a detriment to the estate because of the attorney fees it was generating.

The court also found that it had had the unusual opportunity to observe the substantial consummation of the reorganization plan and that its "fairness, feasibility and propriety" had been verified by these occurrences: administrative claims had been paid or reserved; secured

⁵ Including the City of Miami, IRS, the general contractor, their former lawyers, the former operator and the leasing agent for the hotel, and prospective tenants for the office building.

claims had been paid in full; class 3 claims had been paid in full; undisputed claims in classes 4 through 6 had been paid in full and funds reserved for disputed claims; several disputed claims had been compromised, saving the estates millions of dollars; there remained sufficient funds for the satisfaction in full or in part of the claims of the Gould-affiliated claimants (many of which were unliquidated).

Finally the court went on to hold:

No stay is in effect, and the confirmed plan has been consummated. The debtors' property passed to the Liquidating Trustee, and the debtors were discharged under Code Section 1141. It is now legally and practically impossible to unwind the consummation of the Bank's plan or otherwise to restore the status quo before confirmation.

With respect to consolidation, the court found the facts, and applied the controlling law, at length. It found that in most respects creditors had not objected to consolidation, that the debtors would not be substantially prejudiced by consolidation, and that the hundreds of creditors (many not represented by counsel) should not be required "to engage in a shell game" in attempting to determine which of the interrelated debtors involved in the Miami Center project would be able to pay them. The difficulty in tracing the obligation of claims against the affiliated creditors was, the court held, "completely attributable to the labyrinth that Gould has created."

The bankruptcy court confirmed the orders it previously had entered. The matter came back to the district court with the bankruptcy court's elaborate findings and conclusions. Without addressing the mootness issue the court considered the merits and entered an order on March 20, 1986. It held that the confirmation order before it for review consisted of the initial confirmation order [entered August 8, 1985], as amended by the find-

ings of fact and conclusions of law entered by the bankruptcy court on remand. It reiterated that the confirmation order and the consolidation order were "intertwined and interdependent." With respect to each issue relating to confirmation, including valuation, the district court reviewed the facts as found by the bankruptcy court and the applicable law and found no error. Following this careful, point-by-point review, the district court affirmed the August 8 confirmation order, as amended by the bankruptcy court's order on remand, and affirmed the order approving consolidation.

Arguably the district court should have dismissed the appeal as moot when the case was first before it. But we pretermit discussing this because we hold that the court should have dismissed the appeal as moot when the case came back to it after remand.⁶

The mootness standard is preserved in the present bankruptcy code at 11 U.S.C. § 363(m), but this provision applies only to the sale of the debtor's property by the trustee pursuant to § 363(b) or (c). Section 363(m) does not apply where the debtor's assets have been sold, as here, by a liquidating trustee pursuant to a plan of liquidation. All parties agree that in this case we look for guidance to the case law.

The Eleventh Circuit, like other circuits, has recognized the continuing viability and applicability of the mootness standard in situations other than transfers by a trustee under § 363(b) or (c). *In re Sewanee Land, Coal & Cattle, Inc.*, 735 F.2d 1294 (11th Cir.1984); *Markstein v. Massey Associates, Ltd.*, 763 F.2d 1325 (11th Cir.1985).

⁶ See *In re Bel Air Associates, Ltd.*, 706 F.2d 301 (10th Cir. 1983) (no explicit holding by bankruptcy court on good faith purchaser issue. District court remanded to the bankruptcy court for findings, and that court ruled good faith purchaser status applied. District court adopted this determination and dismissed the appeal).

In *Sewanee* the mortgagees/creditors were permitted to foreclose, both district and circuit courts refused stay pending appeal, and the property was sold at foreclosure to the creditors. On appeal debtors asserted the sale should be rescinded and the property returned to them. Looking to the case law, this court dismissed the appeal as moot. *Markstein* is similar to *Sewanee*. No stay was obtained. Mortgagees/creditors purchased the property themselves at foreclosure. On appeal the debtors sought to have the sale rescinded and the property returned, or other equitable relief. This court held that it was powerless to rescind the sale. It ordered a limited remand to the district court with direction that it make specific findings as to the amount of the mortgage debt and to determine whether the bankrupt estate was entitled to excess, if any, of the foreclosure bid over the debt. The court noted that the appellant had been unable to locate, "any case where a court has granted relief in the situation where property of a debtor was sold at foreclosure to a good-faith purchaser after the debtor had failed to obtain a stay of foreclosure pending appeal." But it had found no case where the amount of the mortgage debt, and of the excess, if any, had not specifically been determined, thus it remanded on these issues. 763 F.2d at 1327 n. 1. No such issue is involved in the present case. With respect to the purpose of the mootness rule, the court held:

This rule of law [lack of power in the court to rescind sale where there has been no stay] was intended to provide finality to orders of bankruptcy courts and to protect the integrity of the judicial sales process upon which good faith purchasers relied.

Id. at 1327.

Matos follows in the same channel. The bankruptcy court permitted foreclosure, debtors were granted a stay conditioned on filing a bond, which they did not file. The

mortgagee/creditor bought the property at foreclosure. This court dismissed the appeal as moot. We said:

It is settled law in this circuit that when the debtor fails to obtain a stay pending appeal of the bankruptcy court's or the district court's order setting aside an automatic stay and allowing a creditor to foreclose on property, the subsequent foreclosure and sale of the property renders moot any appeal. *Markstein v. Massey Associates*, 763 F.2d 1325 (11th Cir.1985); *In re Sewanee Land, Coal & Cattle, Inc.*, 735 F.2d 1294 (11th Cir. 1984). This rule of law, which is permitted upon considerations of finality, protection of the integrity of the foreclosure sale process, and the court's inability to rescind the sale and grant relief on appeal even if the purchaser of the property is a party to the appeal, is fully applicable to this case. Accordingly, the appeal must be dismissed as moot. (Note omitted.)

790 F.2d at 865-66.

The "good faith purchaser" is one who buys in good faith, that is, free of any fraud or misconduct and for value and without knowledge of any adverse claim. *In re Bel Air Associates, Ltd.*, 706 F.2d 301 (10th Cir. 1983); *Greylock Glen Corporation v. Community Savings Bank*, 656 F.2d 1 (1st Cir.1981). Knowledge of claims asserted in a pending appeal does not deprive a purchaser of good faith status. *In re Dutch Inn of Orlando, Ltd.*, 614 F.2d 504 (5th Cir.1980).

When the present case was returned to the district court following remand, the record before the district court included the finding that the bank was a good faith purchaser. It included the detailed findings that the plan was fair, feasible, and proper, and that it had been substantially consummated. And it included the finding that it was legally and practically impossible to unwind the confirmation of the plan or otherwise to restore the status quo. All these findings were affirmed.

The debtors urge, on several grounds, that the mootness standard should not apply:

(1) The mootness rule has no applicability because there has been no transfer to a third party. This argument ties in with the district court's emphasis on the fact that the sale was to a designee of the bank which was within the jurisdiction of the court. No transfer to a third party was involved in *Sewanee, Markstein, or Matos*; in each of those cases the purchaser at foreclosure was the mortgagee/creditor, just as the bank here is the purchaser from the liquidating trustee. Other cases rejecting the "not a third party" argument include *Algeran, Inc. v. Advance Ross Corp.*, 759 F.2d 1421 (9th Cir.1985); *Greylock Glen Corp. v. Community Savings Bank*, 656 F.2d 1, 4 (1st Cir.1981) ("[T]he fact that the bank was both the seller and purchaser of the property, and a party to the dismissed appeal does not affect its status under Rule 805. The rule does not distinguish between mortgage holders and other potential purchasers of encumbered property. It is designed to give finality to orders of the bankruptcy court that have not been stayed pending appeal. . . . No less than any other potential purchaser, the bank was entitled to bid upon the Greylock Glen property with the assurance that its title to the property would not be affected by appellate review months or even years later.")

(2) The bank has never been held to be a purchaser in good faith. On remand the bankruptcy court held the bank was a good faith purchaser, and the district court affirmed the bankruptcy court's findings and affirmed the confirmation order, as amended by the bankruptcy court's findings and conclusions. No factual argument is advanced why the bank is not entitled to good faith purchaser status except that the purchaser is a designee of the bank and within the jurisdiction of the court, an argument already rejected above.

(3) The mootness principle is inapplicable because the debtors do not seek return of the property but only modification of the plan, or, restating, they do not attack the sale but only matters that do not directly relate to the sale.

(4) Mootness does not apply where the purchaser has not taken irrevocable steps in reliance on the purchase.

Points (3) and (4) require us to look beyond *Sewanee*, *Markstein* and *Matos*. These three Eleventh Circuit cases concern single sales at foreclosure of property for which in each instance there was a good faith purchaser. In that confined context the cases are a firm application by this circuit of a broader principle that mootness is appropriate where a court cannot give effective relief. A reorganization case, however, may sweep within its ambit more than a discrete and consummated sale to a good faith purchaser. Within a penumbra of the reorganization plan outside of discrete consummated sales there may be aspects of the reorganization that are not moot.⁷ Cases of this nature include *Matter of Combined Metals Reduction Co.*, 557 F.2d 179 (9th Cir.1977); *In re AOV Industries, Inc.*, 792 F.2d 1140 (D.C.Cir.1986); and *In re Roberts Farms, Inc.*, 652 F.2d 793 (9th Cir.1981). These cases tell us that in considering whether in a reorganization case matters not directly related to sales are within the mootness rule, the court may consider the virtues of finality, the passage of time, whether the plan has been implemented and whether it has been substan-

⁷ The possibility of effective relief for matters unrelated to consummated sales does not, however, subsume the central principle that finality of judgments and certainty are to be protected where there have been sales to good faith purchasers. In this case the district court considered as a global question whether it could grant effective relief and concluded that it could do so because it had the power to undo the sale to the bank, restore the property and possession to the debtor, and set aside the sale provision of the reorganization plan. This analysis stood the law of mootness on its head.

tially consummated, and whether there has been a comprehensive change in circumstances. *AOV*, 792 F.2d at 1148-49. The court will not, however, allow a "piecemeal dismantling" of a reorganization plan. *Id.* at 1149. In *AOV* the court recognized a "strong presumption" of mootness. *Id.* The court may consider whether relief granted by the court could implicate or have an adverse effect on non-party creditors and will affect the re-emergence of the debtor as a revitalized entity. *Id.* In *Roberts Farm* the court considered whether the property transactions "stand independently and apart from the plan of arrangement," and found that "the many intricate and involved transactions . . . were contemplated by the plan of arrangement (even to and including liquidation and reorganization of the debtor corporation) and stand *solely* upon the order confirming the plan of arrangement for court approval and confirmation of the transactions." 652 F.2d at 979. The court concluded that to deny mootness and reverse would "knock the props out from under the authorization for every transaction that has taken place" and "create an unmanageable, uncontrollable situation for the Bankruptcy Court." *Id.* The Eighth Circuit, *In re Information Dialogues*, 662 F.2d 475 (8th Cir.1981), refers to the important policy of bankruptcy law that court-approved reorganization plans be able to go forward based on court approval unless a stay is obtained. In *Matter of National Homewoners Sales Service Corp.*, 554 F.2d 636 (4th Cir.1977) the Fourth Circuit, in sustaining good faith purchaser status and dismissing the appeal as moot, relied upon substantial investment that had been made upon reliance of good title to the property having vested in the purchaser.

The debtors acknowledge that the plan of reorganization has been substantially consummated, but, they say, it remains not completed in several respects, as follows: The trustee is claiming substantial additional sums from the bank as a result of examination and audit of the

bank's interest charges and other closing adjustments in the sale of the Miami Center property. If the bank must pay the lessors for FF & E, it will seek repayment from the estate pursuant to the trustee's certificate, which will deplete sums available to Gould-affiliated creditors. Some disputed claims have yet to be resolved. It is unknown whether claims of Gould-affiliated creditors will be paid in full because some have been assigned a junior priority.

We turn, then, to the relief that the debtors seek and the relationship between it and the reorganization plan. The debtors now say that, although they do not agree with the validity of the sale to the bank, they do not seek to overturn it; indeed, they specifically say that they do not want the property back. They want the sale to stand but the property revalued to a higher figure and the sale price adjusted accordingly. They seek cancellation of the trustee's certificate issued to the bank to cover its exposure with respect to the FF & E. They want a realignment of priorities of claims that will place some of their claims ahead of other unpaid creditors and give some "super priority" ahead of the bank as mortgagee. They want reinstatement of the separate suit they filed against the bank.

The debtors recognize that the relief they request may require the bank's putting up additional cash to preserve its position as purchaser; if so, the bank must sweeten the pot. If it is unwilling to do this, it may have to fall back on its rights as mortgagee.

These prayers for relief must be set against what the bank bargained for, and received as part of the reorganization plan, and the consequences of the plan of granting the prayers. The bank agreed to give up its judgment, calculated at closing at around \$242 million. The amount due under the mortgage and brought forward into the judgment was calculated at "good stand-

ing" interest rates; by agreeing to this calculation the bank surrendered a claim to \$5 million\$6 million of interest at default rates. Presumably if the sale goes for naught the bank would be entitled to this additional amount.

Closing the sale to the bank stopped the running of interest at approximately \$2 million per month. If the sale goes for naught, presumably the bank can seek interest from October 1985, producing an accrual when Judge Aronovitz entered his March 1986 order of approximately \$11 million and currently approximately \$54 million.

The bank bargained for and purchased the FF & E as part of the sale. Because litigation was in progress over whether title to the FF & E was in lessors of the bankrupt, the bank put up \$14 million to pay the lessors if they prevailed. But, since the bank would then have paid twice for the same assets, it was given a trustee's certificate enforceable against assets of the estate to protect it from the double payment. Without the trustee's certificate, if double payment ensues, the bank will become an unsecured creditor to the extent of some \$14 million. The debtors do not suggest any relief for this risk.

The bank put up \$12.5 million of its own money to make up the purchase price. It surrendered \$30 million of cash collateral it was holding. These funds have been the primary source for payments to creditors and reserves totalling approximately \$30 million. The trustee appeared before the district court when, after remand, it heard argument. He pointed out that he had paid some \$14 million in claims, had reserved some \$9 million for claims disputed or in litigation, and held some \$8 million-\$9 million in cash plus some \$7 million in a reserve for contested taxes. The trustee pressed his view that the reorganization plan had to be accepted or re-

jected in its entirety and that rejection would require him to seek to reclaim what he had paid out, much of which was unrecoverable.

The bank might, of course, not wish to become purchaser of the property at an elevated price or to assume the risk of paying twice for FF & E. It might wish to realize on the cash collateral it had held and to foreclose on the real estate. The debtors have not given a meaningful suggestion of how the bank can get back its \$12.5 million or get back the \$30 million cash collateral; they say only that creditors have some or all of it and are entitled to be paid and that the trustee need not seek to recover back from them.

The bank bargained for dismissal of the separate suit as part of the consideration running to it. The debtors want the case reinstated but do not point to any means of restitution to the bank for being again placed at risk of a fraud/RICO case and subjected to attorneys fees for its defense.

All of this demonstrates that the consequences of what debtors seek strike at the sale of the bank and the reorganization plan as a whole. As in *Roberts Farms* the sale of the primary asset does not "stand independently and apart from the plan of arrangement," but rather "the many intricate and involved transactions . . . were contemplated by the plan of arrangement . . . and stand solely upon the order confirming the plan of arrangement." 652 F.2d at 797.⁸ It is "impossible to fashion effective relief" for the bank. *Id.* Granting the remedies the debtors seek would "create an unmanageable, uncontrollable situation for the Bankruptcy Court." *Id.*

The bankruptcy court did not err in finding, and the district court did not err in affirming, that the plan

⁸ The district court found twice that the consolidation order and the confirmation order were intertwined and independent.

had been substantially consummated and that its fairness, feasibility, and propriety had been verified, and that it had become legally and practically impossible to unwind the consummation of the plan or otherwise to restore the status quo before confirmation. The district court was required to dismiss the appeal as moot.

We turn to No. 86-5386: The district court held that the bankruptcy court had the power to order the trustee to dismiss the separate fraud/RICO case because: (1) it was a chose in action which was part of the debtors' estate; (2) on remand the bankruptcy court had conducted a cost/benefit analysis of the value of the suit and concluded that its value was nil; (3) evidence adduced at a post-remand hearing showed that releases previously signed by debtors barred their pursuing the civil action on principles of collateral estoppel.⁹

Judge Aronovitz entered his order affirming the consolidation and confirmation orders on March 20, 1986. On April 30, 1986 District Judge Hoeveler dismissed the fraud/RICO suit, quoting the grounds set out above and, accordingly, entered a dismissal as "an administrative necessity . . . compelled by the decision of the Bankruptcy Court below and the affirmation of that decision by Judge Aronovitz."

Had the appeal to the district court on the consolidation and confirmation orders been dismissed as moot, as it should have been the judgment of the bankruptcy court in that appeal would have become final. The issues adjudicated by that judgment would then have been precluded from reexamination by Judge Hoeveler in his con-

⁹ The bankruptcy court held that it was within the scope of its authority in making this determination because the debtors' right to pursue this action was a matter concerning the administration of the estates, and/or a counterclaim by the estate against persons filing claims against the estate, and/or confirmation of plans, and/or other proceedings, affecting the liquidation of the assets of the estate, and therefore constituted a "core proceeding."

sideration of whether to dismiss the fraud/RICO case. These same consequences will ensue now upon the entry of an order by Judge Aronovitz dismissing the appeal from the bankruptcy court as moot.

The debtors contend that as a matter of separation of powers the bankruptcy court could not require the district court to give up its jurisdiction. This is not what happened. In October 1985, some five months before Judge Aronovitz affirmed the bankruptcy court, the liquidating trustee, on behalf of the debtors, filed a "stipulation" for dismissal with prejudice of the district court case. All parties asked that consideration of the trustee's "motion" to dismiss be postponed until the bulk of the bankruptcy proceedings had been resolved.

After Judge Aronovitz entered his ruling and plaintiffs failed to post an appeal bond to stay the implementation of the reorganization plan pending appeal to this court, the liquidating trustee filed a new motion requesting the court to order dismissal of the district court case. Thus, the liquidating trustee, found by the bankruptcy court to be in control of the separate case as an asset of the debtors' estates, was directed to dismiss the separate suit, he sought to have it dismissed, and Judge Hoeveler responded by entering a dismissal. Dismissal of lawsuits that are assets of the estate is a not-unfamiliar feature of reorganization plans. Debtors' suggestion that the bankruptcy court lacks power, exercised pursuant to a reorganization plan, to direct a trustee to dismiss a suit in a court other than the bankruptcy court is not supported by authority cited to us or by common sense. The underpinnings of the bankruptcy court's order to the trustee will be finally determined by the bankruptcy court order once the finality of that order is established by the mootness of the appeal to the district court. As now recognized, though retrospectively, the district court's order dismissing the separate suit, as requested by the trustee, will be correct and will be due to be affirmed.

Conclusion

We VACATE the order of September 8, 1987 appearing at 826 F.2d 1010.

In No. 86-5286 we VACATE the judgment of the district court affirming the consolidation order and the confirmation order of the bankruptcy court and REMAND that case to the district court with instructions to dismiss the appeal to it from the bankruptcy court as moot.

Forthwith upon entry of the order by the district court, as directed in No. 86-5286, the judgment in No. 86-5386 shall stand AFFIRMED.

The petition for rehearing by the Bank of New York is DENIED. The petition for rehearing by the appellants is DENIED.

No member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion of Rehearing In Banc is DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

Nos. 86-5286, 86-5386

MIAMI CENTER LIMITED PARTNERSHIP,
MIAMI CENTER CORPORATION,
THEODORE B. GOULD, CHOPIN ASSOCIATES, and
HOLYWELL CORPORATION,
Plaintiffs-Appellants,

v.

BANK OF NEW YORK,
Defendant-Appellee.

MIAMI CENTER CORPORATION and CHOPIN ASSOCIATES,
Plaintiffs-Appellants,

v.

THE BANK OF NEW YORK, *et al.*,
Defendants-Appellees.

Sept. 8, 1987

Appeal from the United States District Court for the
Middle District of Alabama.

Before GODBOLD and ANDERSON, Circuit Judges,
and SWYGERT,* Senior Circuit Judge.

* Honorable Luther M. Swygert, Senior U.S. Circuit Judge for
the Seventh Circuit, sitting by designation.

ON PETITION FOR REHEARING

(Opinion June 29, 1987, 11 Cir., 820 F.2d 376).

PER CURIAM:

Petitioners are correct that neither the bankruptcy court nor the district court made an express or implied finding that the project was sold to a good faith purchaser, and in this respect the opinion of the court is corrected. This does not affect our conclusion because debtors do not challenge the sale of the project or seek reconveyance of the project.

In all other respects the petition for rehearing is **DENIED.**

APPENDIX C

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

Nos. 86-5286, 86-5386

MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER
CORPORATION, THEODORE B. GOULD, CHOPIN ASSOCI-
ATES, and HOLYWELL CORPORATION,

Plaintiffs-Appellants,

v.

BANK OF NEW YORK,

Defendant-Appellee.

MIAMI CENTER CORPORATION and
CHOPIN ASSOCIATES,

Plaintiffs-Appellants,

v.

THE BANK OF NEW YORK, *et al.,*

Defendants-Appellees.

Appeals from the United States District Court
for the Southern District of Florida

June 29, 1987

OPINION OF THE COURT

Before GODBOLD and ANDERSON, Circuit Judges, and SWYGERT*, Senior Circuit Judge.

GODBOLD, Circuit Judge:

These consolidated appeals are before us on two separate but related district court decisions: (1) affirmance of the bankruptcy court's confirmation of a proposed reorganization plan (No. 86-5286); and (2) dismissal of a separate action against the Bank of New York (No. 86-5386). We dismiss these appeals as moot.

BACKGROUND

Appellants are the five debtors in the underlying Chapter 11 proceeding: Theodore Gould; Holywell Corporation (Gould is sole stockholder and president); Miami Center Corporation (wholly-owned subsidiary of Holywell with Gould as president); Chopin Associates (general partnership between Gould and Miami Center Corporation); and Miami Center Limited Partnership (Gould and Miami Center Corporation are general partners and owners of some limited partnership shares). These debtors developed the Miami Center Project, which consisted of an office building, a hotel, retail space and a garage in downtown Miami. The Bank of New York financed the construction of the Project.

Debtors filed voluntary petitions for bankruptcy when the Bank instituted foreclosure proceedings against the Project. The filing of the petitions automatically stayed all actions against debtors, including the Bank's foreclosure action. Over 400 creditors have or had an interest in the bankruptcy proceeding.

* Honorable Luther M. Swygert, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

Both debtors and the Bank filed competing reorganization plans in the bankruptcy proceeding.¹ The creditor committees and individual creditors overwhelmingly approved the Bank's plan and rejected debtors' plan. The bankruptcy court subsequently confirmed the Bank's plan, over debtors' and debtor-affiliated entities' objections.²

Debtors sought to stay the implementation of the reorganization plan pending an appeal to the district court. The bankruptcy court conditioned such a stay on the posting of a \$140 million bond, later reduced by the dis-

¹ Although the five debtors submitted individual plans, the plans were virtually identical.

² The central features of the reorganization plan were:

(1) substantive consolidation of the estates of the five debtors;
 (2) creation of the Miami Center Liquidating Trust, consisting of all assets of debtors, for the payment of creditor claims by a court-appointed liquidating trustee;

(3) purchase by the Bank or its designee of the project (including furniture, fixtures and equipment) for the appraised value of \$255.6 million, which was to be funded by net amount owed to the Bank by debtors (approximately \$240 million) plus new cash by the purchaser;

(4) release by the Bank of its cash collateral (approximately \$30 million), which would be added to the new trust;

(5) further financing commitment of approximately \$15 million by the Bank for payment of the claim of Miami Center Joint Venture (which is a general partnership between Gould and Olympia & York Corporation) for the furniture, fixture and equipment leased by the joint venture to the project (a) if and when such claim is allowed over the Bank's pending objections now on appeal in a separate action; (b) to the extent that other assets of the trust prove insufficient to pay the claim; and (c) only if it is ultimately determined that the joint venture has been damaged by its allegedly improper classification under the reorganization plan;

(6) classification of the claimants so that unaffiliated creditors of Holywell are paid first, unaffiliated creditors of other debtors paid next, and inter-debtor and related party claims paid last; and

(7) dismissal by the trustee of the pending related lawsuit by debtors against the Bank.

trict court to \$50 million. We dismissed an interlocutory appeal of this bond requirement for lack of jurisdiction. Debtors failed to post the bond within the required time limit, and the trustee began implementing the reorganization plan, including the sale of the Miami Center Project to the Bank's designee for \$255.6 million.

Debtors appealed the bankruptcy court's confirmation of the reorganization plan. District Judge Aronovitz of S.D. Florida denied the Bank's motion to dismiss the appeal and remanded the case to the bankruptcy court for entry of explicit findings of fact and conclusions of law upon which the district court could properly base its appellate review. On remand the bankruptcy court held an evidentiary hearing and solicited proposed findings of fact and conclusions of law from each party. The bankruptcy court adopted the Bank's proposed findings and again confirmed the Bank's proposed reorganization plan. On appeal Judge Aronovitz affirmed the bankruptcy court's confirmation order. 59 B.R. 340.

Debtors also filed a separate action in district court against the Bank, alleging fraud, RICO violations, and other claims in connection with construction loans made by the Bank for the Miami Center Project. District Judge Hoeveler of S.D. Florida dismissed this related action primarily because the reorganization plan, which was confirmed by Judge Aronovitz, instructed the trustees to dismiss the action. Debtors now appeal both Judge Aronovitz's confirmation of the reorganization plan (No. 86-5286) and Judge Hoeveler's dismissal of debtors' related action against the Bank (No. 86-5386).³

³ Debtors object to the reorganization plan on several grounds: substantive consolidation of the debtors' estates was clearly erroneous; subordination of the claims of debtor-affiliated entities was clearly erroneous; and modification and amendment of the reorganization plan was improper where the Bank failed to issue a disclosure statement regarding the proposed changes and the bank-

DISCUSSION

The Bank's motion to dismiss these appeals was carried with the case. The Bank contends that the appeals are moot because the reorganization plan has been substantially consummated. It relies primarily on our decisions in *In re Matos*, 790 F.2d 864 (11th Cir.1986) and *In re Sewanee Land, Coal & Cattle, Inc.*, 735 F.2d 1294 (11th Cir.1984). We explained in *In re Matos* that "when the debtor fails to obtain a stay pending appeal of the bankruptcy court's or the district court's order setting aside an automatic stay and allowing a creditor to foreclose on property, the subsequent foreclosure and sale of the property renders moot any appeal." 790 F.2d at 865; *see also In re Sewanee Land*, 735 F.2d at 1295-96.

The rationale in these cases for dismissing an appeal as moot for failure to obtain a stay pending appeal is that a court cannot order relief without compromising the integrity of the sale of the property to a good faith purchaser. *In re Matos*, 790 F.2d at 866; *Markstein v. Massey Assocs.*, 763 F.2d 1325, 1327 (11th Cir.1985). In this case debtors did not post the bond for the stay, and the project has since been sold to a good faith purchaser. This does not conclude our inquiry, however, because the reorganization plan governed more than just the sale of the project, and an appeal is not moot if the court can still order some effective relief. *See In re Matos*, 790 F.2d at 865 n. 3 (although court could not reverse title if the debtor failed to obtain a stay pending appeal, the appeal was not moot where the debtor could obtain an award of damages from the trustee); *see also In re AOV Indus.*, 792 F.2d 1140, 1146 (D.C.Cir.1986)

ruptcy court failed to require a hearing on the proposed changes. Debtors also contend that the district court erred in dismissing their related action against the Bank. The Bank makes two motions, which were carried with the case; a motion to dismiss the appeals as moot and a motion to strike debtors' reply brief.

("[F]ailure to obtain a stay is not *per se* dispositive of all the issues before [the appellate court].").

The proper standard to apply in this case is whether the reorganization plan has been so substantially consummated that effective relief is no longer available. See *In re AOV Indus.*, 792 F.2d at 1147-48 ("Determinations of mootness . . . require a case-by-case judgment regarding the feasibility or futility of effective relief should a litigant prevail."); *In re Sun Country Dev., Inc.*, 764 F.2d 406, 407 n. 1 (5th Cir.1985) ("To dismiss [an] appeal on the basis of mootness, we must find that the plan has been so substantially consummated that effective judicial relief is no longer available to [the complaining party].") *In re Information Dialogues, Inc.*, 662 F.2d 475, 476 (8th Cir.1981) (*per curiam*) (appeal moot when it is "impossible for a court to grant effective relief"); *In re Roberts Farms*, 652 F.2d 793, 797 (9th Cir.1981) (appeal moot when reorganization plan "has been so far implemented that it is impossible to fashion effective relief for all concerned").

Debtors asked Judge Aronovitz to reverse both the bankruptcy court's substantive consolidation of their estates and the court's confirmation of the proposed reorganization plan. They concede on appeal that circumstances have changed since the confirmation order was entered and that complete reversal of the bankruptcy court's orders may no longer be possible. They instead ask for partial reversal and more limited relief. First, they ask us to reverse the bankruptcy court and essentially restructure the reorganization plan so that debtor-affiliated creditors have priority to all remaining funds in the estate. Second, they ask us to reinstate their related lawsuit against the Bank.⁴

⁴ Debtors request the following specific relief:

(1) reverse in part the substantive consolidation order and unconsolidate the estates that are solvent (Holywell and Gould),

The reorganization plan has been substantially consummated.⁵ The trustee has conveyed the project, worth over \$250 million, to a good faith purchaser pursuant to the reorganization plan. With the exception of debtor-affiliated creditors, the trustee has paid the undisputed claims of all creditors and reserved funds to pay the disputed claims of the remaining creditors. Effective relief is therefore impossible. See *In re Information Dialogues, Inc.*, 662 F.2d at 476 (effective relief impossible

close their cases, and let them emerge from bankruptcy with their remaining assets;

(2) reverse in part the confirmation order and restore to their proper status "super priority" loans made by Gould and Holywell to the Miami Center Project so that they have priority over all other creditor claims;

(3) reverse in part the confirmation order and modify the reorganization plan so that leasing claims by debtor-affiliated creditors are restored to the priorities to which they are entitled under the Bankruptcy Code;

(4) reverse in part the confirmation order and vacate the trustee's certificate that entitles the Bank to recover any funds it advances to the joint venture for furniture, fixtures and equipment or modify the reorganization plan so that the Bank's claim for reimbursement is junior to debtor-affiliated claims;

(5) distribute the remaining funds in accordance with the revised classification of the remaining creditor claims; and

(6) reverse Judge Hoeveler's dismissal of debtors' related action against the Bank and reverse in part the confirmation order, thus requiring the trustee to pursue debtors' related action or permitting debtors to pursue the action on their own.

⁵ 11 U.S.C. § 1101(2) defines "substantial consummation" for purposes of bankruptcy as follows:

(A) transfer of all or substantially all of the property proposed by the plan to be transferred;

(B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and

(C) commencement of distribution under the plan.

where all undisputed creditor claims have been paid and funds reserved for all disputed creditor claims).

Debtors' reliance on *In re AOV Indus.*, 792 F.2d 1140 (D.C.Cir.1986) is misplaced. In that case substantial funds remained available to compensate the remaining creditors. At the time of the hearing, "only \$643,000 of the \$3 million made available by the [purchaser's] letter of credit had been drawn down, and none of [the debtor's] \$800,000 contribution had been distributed." *Id.* at 1149. Moreover, the court explained that on a motion to dismiss an appeal as moot, a court must consider the proposed relief's "potential impact on the reorganization scheme as a whole," including whether the relief will "implicate or have an adverse effect on the interests of other, non-party creditors." *Id.* at 1148-49.

Unlike the situation in *In re AOV Indus.*, the impact of the proposed relief on the reorganization plan and innocent creditors would be significant. Debtors can obtain their requested monetary relief only at the expense of the few remaining unaffiliated creditors whose claims are still in dispute and of the Bank, which has complied with all of its obligations under the reorganization plan. This relief therefore would not be effective judicial relief.

Reinstating the related lawsuit against the Bank and permitting the trustee or debtors to pursue the action would be similarly ineffective relief. Dismissal of the suit against the Bank was an integral part of the reorganization plan, pursuant to which the Bank released \$30 million of its cash collateral and extended a further financing commitment of \$15 million. Because the Bank has complied with its obligations under the reorganization plan, and because the trustee has paid or reserved funds to pay all creditors other than debtor-affiliated creditors, this court cannot provide effective relief.

Following the submission of these appeals for decision the appellants have moved to supplement the record by

filing orders and opinions entered by the Southern District of Florida and the bankruptcy court of the Southern District of Florida, allegedly concerning the matters submitted to this court for decision. The motion is DENIED. This court has, however, treated the motion as though it had been filed under FRAP Rule 28(j) and has considered the opinions and orders attached to the motion as supplemental citations. Having considered these supplemental citations, the court remains of the view that these appeals must be and are DISMISSED.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case. No.: 85-3225-Civ-Aronovitz (Appeal)

Bk. Nos.: 84-01590-BKC-TCD
84-01591-BKC-TCB
84-01592-BKC-TCB
84-01593-BKC-TCB
84-01594-BKC-TCB

HOLYWELL CORPORATION,
MIAMI CENTER LIMITED PARTNERSHIP,
MIAMI CENTER CORPORATION,
CHOPIN ASSOCIATES,
THEODORE B. GOULD,
Appellants,

v.

THE BANK OF NEW YORK,
Appellee.

ORDER AFFIRMING
CONFIRMATION ORDER AND PLAN

I. THE NATURE OF THE APPEAL

THIS APPEAL involves, as appellants, five (5) related debtors who simultaneously filed Chapter 11 proceedings in the United States Bankruptcy Court, submitting almost identical Plans for Reorganization; and as appellee, the principal creditor, the Bank of New York, a mortgage lien-holder for the subject real property development.

Appellants appeal from two (2) Orders of the Bankruptcy Judge, intertwined and interdependent:

- A. An Order approving the substantive consolidation of the debtors' estates (Court Paper ["CP"] 840); and,
- B. The trial court's Order confirming the Plan of Reorganization proposed by the appellee here, the Bank of New York, the major creditor of the debtors' estates (CP 906).

These appeals are taken from the Order approving Substantive Consolidation of the debtors' estates and the Order Confirming the appellee's Plan of Reorganization.

II. THE PARTIES AND THEIR RESPECTIVE INTERESTS

The debtors are as follows:

1. Holywell Corporation ("Holywell") is a Delaware corporation, incorporated in 1976, which, together with its subsidiaries, owns, operates, and provides a full range of services for commercial real estate. Theodore B. Gould is the sole stockholder of Holywell.

2. Miami Center Limited Partnership ("MCLP") is a Florida limited partnership which was formed in 1979. The general partners are Theodore B. Gould and Miami Center Corporation. There are numerous limited partners, which include Theodore B. Gould and Holywell. MCLP leased the land from Chopin Associates and then constructed the Miami Center Project on that land.

3. Miami Center Corporation ("MCC"), a Florida corporation, was incorporated in 1979. MCC is a subsidiary of Holywell. Holywell, in turn, is the principal stockholder of MCC.

4. Chopin Associates ("Chopin"), a Florida partnership composed of Theodore B. Gould and MCC, was

formed in 1979 and is the owner of the land underlying the Miami Center.

5. Theodore B. Gould ("Gould") is the sole stockholder, a director and president of Holywell, the president and a director of MCC, a general partner of MCLP, and a partner of Chopin Associates.

The Bank of New York (the "Bank") was the construction lender for the Miami Center Project.

Construction of the Miami Center Project commenced in 1980. Chopin purchased the land and, together with MCLP, obtained a construction loan from the Bank of New York on March 23, 1980 in the initial amount of \$112,500,000. Chopin's mortgage was \$23,000,000.

Gould, in addition to his interest in the Miami Center Project, also acquired four blocks of land, still vacant, adjacent to the Miami Center Project. That vacant land is not involved in these bankruptcy proceedings. Gould then entered into a joint venture in May 1981 with Olympia and York Florida Equity Corporation ("O&Y"), called the Miami Center Joint Venture ("MCJV"), which provided for the development of those blocks and further provided that O&Y would loan to MCJV \$7,775,000. These funds were used by MCJV to acquire furniture, fixtures, and equipment ("FF&E") which were leased to MCLP for use in the Pavillon Hotel and Podium, which are part of the bankruptcy estate. The MCJV-MCLP leases of FF&E were referred to by the parties and the Bank and in the proceedings below as Lease "A" and Lease "B". MCJV is solvent and has not filed under the Bankruptcy Code.

MCLP also leased additional FF&E, including electronic and telephone equipment, from two subsidiaries of Holywell, Holywell Telecommunications Company ("Holywell Telecommunications") and Holywell Leasing Company ("Holywell Leasing") (the "C" and "D" Leases,

respectively) on February 1, 1983. Holywell and Gould supplied capital to Holywell Leasing and Holywell Telecommunications in the amount of \$7,718,466 to purchase the FF&E which was leased by Holywell Telecommunications and Holywell Leasing to MCLP. Like MCJV, Holywell Telecommunications and Holywell Leasing are solvent companies and have not filed under the Bankruptcy Code.

The appellants are five (5) related or affiliated debtors which voluntarily sought reorganization under the Bankruptcy Code. The debtors developed the Miami Center Project in downtown Miami. Only Phase I of that project was built. Phase I consists of an office building, a hotel, retail space connecting them, and a parking garage. The project failed financially, and several hundred creditors are still owed money by the debtors for goods and services. The appellee Bank was the construction lender for the project, and was owed more than \$240,000,000. Total claims against the debtors exceed \$350,000,000.

Over 400 creditors have or had an interest in these proceedings, of which at least 200 represent wage-earner claims. Since the confirmation of the appellee's proposed plan of reorganization by the Bankruptcy Court's Confirmation Order (which Order is the subject of this appeal), the Liquidating Trustee has paid, or has reserved funds to pay, all creditors in Classes 1 through 6, as those classifications were drawn under the Plan.¹ The amount paid out to claimants or "reserved" for payment by the Liquidating Trustee thus far is approximately \$14 million, leaving approximately \$8.9 million dollars remaining in the consolidated debtors' estates to pay the remaining creditors' claims.

¹ See Part IV., *supra*.

III. PROCEDURAL HISTORY

The Chapter 11 proceedings, which culminated in the Order of Confirmation from which this appeal is taken, were initiated through the filing of voluntary petitions under Chapter 11 by each of the five debtors/appellants who are parties to this appeal. The voluntary petitions for reorganization were filed by the debtors on August 22, 1984, less than a month after the appellee had initiated foreclosure proceedings in state court upon declaring the debtors' mortgage loans on the Miami Center to be in default.

In the course of Chapter 11 reorganization proceedings, both the debtors and the Bank of New York filed competing reorganization plans. The five debtors each submitted a separately filed plan, but the content of the five debtors' plans was virtually identical. (The details of the competing plans are discussed in Part IV of this opinion, *infra*.) The various creditors' committees and individual creditors, upon consideration of the competing plans, overwhelmingly approved the Plan of the appellee, the Bank of New York, and rejected the debtors' Plans. The Bank's Plan was subsequently confirmed by the Bankruptcy Court (CP 906).

The debtors then sought, unsuccessfully, to stay the implementation of the confirmed Plan, pending appeal to the United States District Court. When the Bankruptcy Court conditioned the issuance of such a stay upon the posting of a supersedeas bond in the amount of \$140 million dollars (CP 1013), the debtors filed an emergency motion in the United States District Court seeking relief from the bond requirement. That Court, by the Order of Chief Judge James Lawrence King, reduced the amount required to obtain a stay of the Bankruptcy Court's order to \$50 million dollars (Docket Number ["DN"] 4). Unable to post this reduced bond, the debtors finally sought relief from Judge King's order by

filing an appeal in the Eleventh Circuit Court of Appeals. The appeals court dismissed the debtors' appeal on the basis of lack of jurisdiction on October 9, 1985. On October 10, 1985, pursuant to the confirmed Plan of Reorganization, the Miami Center property was sold to the appellee's designee for \$255.6 million dollars.²

Prior to the sale of the Miami Center Project, on October 1, 1985, the debtors initiated the instant appeal to this Court from the Confirmation Order entered below. This Court received extensive briefs as well as the parties' designated record on appeal, and heard oral argument by counsel for the debtors and for the Bank on December 5, 1985. During the course of this appeal, and prior to the hearing noted above, the appellee filed a motion to dismiss this appeal on the ground of mootness. Having considered the issues presented by the appeal, the record before it, and the appellee's motion to dismiss, this Court entered its Order of Remand and Denial of Motion to Dismiss (DN 35) on December 30, 1985. In that Order, this Court denied the appellee's motion to dismiss on the ground that the Court retained the capacity to grant effective relief to the appellants herein in the event that they should prevail on the merits in this appeal. Upon the subsequent motion of the appellee, the Court certified the question of mootness and the propriety of its Order denying the motion to dismiss pursuant to Title 28 U.S.C. § 1292 (DN 44), and the appellee filed its interlocutory appeal in the Eleventh Circuit Court of Appeals. Under date of March 17, 1986, the Eleventh Circuit DENIED permission to appeal pursuant to 28 U.S.C. § 1292(b).

² The purchase price of \$255,600,000 was funded by the Bank through elimination of its mortgage liens, the waiver of interest owed by the debtors thereon, and the application of certain cash collateral (approximately \$30,000,000) derived from the sale by the debtors of certain real estate holdings near Washington, D.C. The closing also resulted in the Bank paying over to the Trustee approximately \$11.4 million dollars cash at closing.

By the same Order of Remand and Denial of Motion to Dismiss, this Court remanded the substantive appeal to the Bankruptcy Court for the entry, by that court, of explicit findings of fact and conclusions of law upon which this Court could properly base its appellate review. This remand was necessitated by the determination that the Confirmation Order entered by the Bankruptcy Court was not sufficiently supported by such findings and conclusions.

On remand, the Bankruptcy Court held an evidentiary hearing on all matters requested by the parties. Additional evidence was adduced on the following requested matters, to-wit:

- A. The Value of the Miami Center Project;
- B. The Value or "Cost/Benefit" of the District Court Action; and,
- C. The Calculation of the Bank's Lien.

On January 29, 1986, the Bankruptcy Court concluded its proceedings on remand, having solicited from all parties their proposed findings of fact and conclusions of law as well as the objections of each party to the submissions of opposing parties. The Bankruptcy Court thereupon entered its Order on Remand, in which it adopted *in toto* and unaltered, the proposed findings of fact and conclusions of law submitted by the appellee, the Bank of New York.³ Thus, the initial Confirmation

³ The appellants in their Brief Following Order on Remand have severely chided the Bankruptcy Judge, and the appellee, for the manner in which the findings of fact and conclusions of law were adopted in this case. Specifically, the appellants take issue with the decision by Judge Britton to adopt verbatim, without any deletion or addition, the proposed findings and conclusions submitted by the appellee while rejecting totally those proposed by appellants.

This Court is well aware of the censure which this practice often elicits, and which the Court of Appeals for this Circuit has clearly

Order, as amended by the adoption of these findings of fact and conclusions of law, constitutes the basis of the debtors' substantive appeal.

IV. THE COMPETING PLANS OF REORGANIZATION

The debtors' plans (CP 466-470) differed substantially from that submitted by the Bank of New York and later confirmed by the Bankruptcy Court. The debtors' plans would have depended for their success upon the consummation of an "option" for the sale of all property owned by the debtors as part of the Miami Center property to the Hadid Investment Group, Inc. (*See, e.g.*, the Amended Plan of Reorganization filed by the Miami Center Corporation, CP 468, Exhibit A.). The plan(s) further provided, in pertinent part, for a classification scheme by which, *inter alia*, the claims of the Bank of New York

expressed. *Cabriolet Porsche-Audi, Inc. v. American Honda Motor Company*, 773 F.2d 1193, 1198 n.2 (11th Cir. 1985) (disapproving the practice of verbatim adoption of findings and conclusions prepared by one party to this litigation). This Court does not condone the practice followed by the Bankruptcy Judge in this case. It is the Court's belief that a trial judge should not accept *in toto* the findings and/or conclusions proposed by a party to litigation without an independent analysis in which the judge augments or replaces the proposed findings with his own.

Notwithstanding this admonition, the Court is also aware of the United States Supreme Court's ruling in *Anderson v. Bessemer City*, 470 U.S. —, 105 S.Ct. 1504 (1985). There, while disapproving of the practice of adopting unchanged the proposed findings and conclusions of a party, the Court noted that such findings "nevertheless . . . are those of the Court and may be reversed only if clearly erroneous." 105 S.Ct. at 1511. Thus, whether this Court approves of the procedure followed by Judge Britton upon remand in this appeal is not determinative. In light of the ruling in *Anderson*, but with a clear appreciation of the admonition of the Eleventh Circuit in *Cabriolet Porsche-Audi*, this Court has given close scrutiny to the findings of fact adopted below, but within the scope allowed such review by the "clearly erroneous" standard of Bankruptcy Rule 8013.

under its mortgage liens would be equitably subordinated, pursuant to Title 11 U.S.C. § 510(c), to Class 5, which is subordinate to administrative claims, tax claims and mechanics liens, *inter alia*. The claims of affiliated (with the debtors) creditors would be relegated to the lowest class (Class 10), and would include claims by one debtor/appellant against another.

Lastly, the proposed plans of the debtors explicitly reserved their rights to pursue claims which were the subject of litigation in other forums. One such case is a civil action filed by the debtors against the Bank of New York (Case No. 85-0228-Civ-HOEVELER) in the United States District Court for the Southern District of Florida, which complaint alleges fraud, usury, breach of contract, and claims under the federal RICO statutes. As noted above, the plans submitted by the debtors received little support from the creditors⁴; and were found by the court not to have met the standard for confirmation established by Title 11 U.S.C. § 1129.⁵

The plan submitted by the Bank of New York, adopted by the requisite number of creditors, and finally confirmed by the Bankruptcy Court, contained the following major provisions:

—The Bank would acquire the entire Miami Center Project property, including the FF&E for \$255,600,000. The acquisition would be funded through

⁴ See the Confirmation Order entered by Judge Britton (CP 906). At page 2 of that order, the Bankruptcy Court set out the results of the creditor voting on the respective plans:

	Debtors' Plans		BONY Plan	
Holywell	97%	Rejection	15%	Rejection
MCLP	80%	"	10%	"
MCC	99%	"	10%	"
Chopin	99%	"	0.1%	"
Gould	80%	"	12%	"

⁵ Confirmation Order (CP 906), at 5.

the net amount already owed to the appellee by the debtors (approximately \$240,000,000) to which would be added, as cash collateral, the proceeds of the sale by the debtors of certain realty owned by them in Washington, D.C. (\$32,000,000). This latter sum of \$32,000,000 has been held and maintained as additional collateral by the Bank pursuant to Judge Britton's order of December 31, 1984 (CP 303). The proceeds of closing would also produce approximately \$11.4 million dollars in cash available for use under the Plan.

- A Liquidating Trustee would be appointed to oversee the operations of the Miami Center in place of the debtors in possession, and to effectuate the terms of the Plan as directed by the Bankruptcy Court. This Liquidating Trustee would be required, by the terms of the Plan, to effect the dismissal of the debtors' civil action before Judge Hoeveler, discussed previously.
- The Bank would set aside \$15,000,000, backed by surety bonds, to pay the claims of two creditors which had leased FF&E to MCLP, namely, O&Y and MCJV (the partnership comprised of Olympia & York Florida Equity Corporation and debtor Theodore Gould).
- The claims of Miami Center Joint Venture, Holywell Telecommunications and Holywell Leasing, affiliated creditors who had leased the FF&E to the Miami Center owners, would be equitably subordinated to, or given a classification junior to, those of other creditors on the ground that these were "insider" claims.
- The estates of the five debtors would be combined through substantive consolidation.

The Bank's proposed plan of reorganization was confirmed on August 8, 1985 by the Bankruptcy Court's

Confirmation Order (CP 906) and was implemented upon the dismissal of the debtors' appeal by the Eleventh Circuit Court of Appeals on October 9, 1985.

V. PRESENT STATUS AS TO CONSUMMATION OF THE PLAN BY THE LIQUIDATING TRUSTEE

The United States Bankruptcy Judge noted the following in his Findings at Paragraph 57 (Page 33 of Order on Remand):

"The Court has now also had the unusual opportunity to observe the substantial consummation of the Plan under evaluation (after the debtors failed to post the appeal bond upon which a stay was conditioned). The fairness, feasibility, and propriety of the Plan have been verified by the following, as reported by the parties and the Liquidating Trustee:

(a) All Class 1 administrative claims have been paid or reserved for;

(b) The Project was sold on October 10, 1985, resulting in the satisfaction in full of the claim of the class 2 creditor (the Bank) and the termination of interest (accruing at over \$2 million per month) and negative cash flow from operations;

(c) The Class 3 creditor has been paid in full;

(d) Undisputed claims in Classes 4 through 6 have been paid in full, and funds have been reserved for all disputed claims;

(e) Several disputed claims have been compromised, saving the estates millions of dollars as against the amount claimed; and,

(f) There remain sufficient funds for the satisfaction in full or in part of the claims of the Gould-affiliated claimants (although the exact

amount cannot yet be determined because so many of the claims are unliquidated).

No stay is in effect, and the confirmed plan has been consummated. The debtors' property passed to the Liquidating Trustee, and the debtors were discharged under Code Section 1141. . . ."

VI. STANDARD OF REVIEW

It is settled beyond dispute that a district court, in deciding an appeal from a bankruptcy court's ruling, must accord substantial deference to the trial court's findings of fact, reversing these only when they are "clearly erroneous". *Matter of Missionary Baptist Foundation of America*, 712 F.2d 206, 209 (5th Cir. 1983); *Bankruptcy Rule* 8013. Conclusions of law, however, are freely reviewable by the district court. *Matter of Multiponics*, 622 F.2d 709, 713 (5th Cir. 1980).

VII. ISSUES ON APPEAL

In their appeal from the Bankruptcy Court's Confirmation Order, the debtors/appellants raised seven distinct objections to the confirmed plan. In the course of the extensive briefing and oral argument in which counsel for the parties have participated, it has become evident to this Court, and acknowledged by counsel, that two of the issues raised in this appeal predominate:

- A. The Substantive Consolidation of the Debtors' Estates; and,
- B. The Equitable Subordination (or improper classification) of the claims of various creditors who were affiliated with the debtors.

A. *Substantive Consolidation*

This Court is keenly aware of the seemingly harsh results which may be produced by substantive consolidation

if the Bankruptcy Court invokes it inappropriately or contrary to law. Consequently, this phase of the appeal has been studiously examined.

The Bankruptcy Court, by its order of July 23, 1985 (CP 840) ordered the substantive consolidation of the debtors' estates. This ruling was reinforced by that court in its Confirmation Order entered August 8, 1985 (CP 906). The effect of substantive consolidation upon the debtors in this Chapter 11 proceeding is more than merely procedural; it entails the combination of the assets and liabilities of the individual debtors and the elimination of inter-debtor claims, excepting those incurred under the authorization of the Bankruptcy Court.⁶ See generally 5 Collier on Bankruptcy, § 1106 (15th Edition). Substantive consolidation is within the power of a bankruptcy court by virtue of its general equitable power to issue those orders necessary to effectuate the provisions of the Bankruptcy Code. *In re Richton International Corp.*, 12 Bankr. Rptr. 555, 557 (S.D.N.Y. 1981), citing *Pepper v. Litton*, 308 U.S. 295, 60 S.Ct. 328 (1939).

In order to justify the imposition of substantive consolidation upon debtors in a Chapter 11 proceeding, it is incumbent upon the proponent of consolidation to show that the creditors will suffer greater prejudice in the absence of consolidation than the debtors (and any objecting creditors) will suffer from its imposition. *In re Snider Brothers*, 18 Bankr. Rptr. 230, 238 (D. Mass. 1982). As an aid to (but not as a substitute for) making this determination of the balance of equities for and against substantive consolidation, many courts employ a seven-part objective inquiry into the interrelationships

⁶ Certain inter-debtor loans were specifically allowed by the Bankruptcy Court during the conduct of the Chapter 11 proceedings below to enable the debtors in possession to continue operation at the Miami Center. The so-called "super-priority" loans are discussed more fully at Part VII.B(3), *infra*.

of the entities to be consolidated. These seven factors (not all of which must be found to support consolidation) are:

- (1) The presence or absence of consolidated financial statements;
- (2) The unity of interests and ownership between various corporate entities;
- (3) The existence of parent and intercorporate guarantees on loans;
- (4) The degree of difficulty in segregating and ascertaining individual assets and liabilities;
- (5) The existence of transfers of assets without formal observance of corporate formalities;
- (6) The commingling of assets and business functions;
- (7) The profitability of consolidation at a single physical location.

In Re Donut Queen, 41 Bankr. Rptr. 706, 709 (Bkctcy. E.D.N.Y. 1984).

In its Order of Remand to the Bankruptcy Court, this Court instructed the court below in its findings of facts and conclusions of law to address, *inter alia*, the *Donut Queen* factors, and to enter specific findings and conclusions thereupon. Having closely reviewed the findings of fact and conclusions of law entered by the Bankruptcy Court, and having considered the briefs and oral argument of counsel for the parties, the pertinent portions of the record on appeal, and the applicable law, it is the conclusion of this Court that the order imposing substantive consolidation upon the estates of the five debtors, and that portion of the Confirmation Order which adopts this ruling, was proper and correct as a matter of law and was based on sufficient factual findings which were not, themselves, clearly erroneous.

In Paragraphs #30 to 41 of its Order on Remand, the court below entered findings of fact in support of its rulings on substantive consolidation. A review of these findings in comparison to the *Donut Queen* factors reveals that there exists in this record strong and convincing evidence to show the existence of at least five of the seven factors enumerated in that decision:

1. The presence of consolidated financial statements (inapplicable to debtors Holywell and Miami Center Corp.);
2. The unity of interests and ownership between the various corporate entities;
3. The existence of cross-claimants of guarantees on loans to other debtors;
4. ...;
5. ...;
6. The commingling of assets and business functions;
7. The profitability of consolidating the debtors in one location.

As to the two remaining factors (the degree of difficulty in segregating individual assets and the transfer of assets absent corporate formalities), no explicit findings of fact were entered in the court's Order on Remand.

The Bankruptcy Court's findings on five of the seven *Donut Queen* factors constitute a factual basis for its decision to order substantive consolidation in this case. This Court, however, must go further than merely evaluating the correctness of these factual findings. It must assess the propriety of imposing substantive consolidation as a matter of law. In this aspect of its review, this Court will affirm those conclusions of law entered below which correctly apply the law. Where the Bankruptcy Court has erred in its conclusions, this Court will conduct

a *de novo* review of the legal issues presented in this appeal.

Therefore, this Court rules that the Bankruptcy Court correctly determined, as a matter of law, that substantive consolidation was proper in this case. At Paragraph 67 of its Order on Remand, that court applied the standard of *In Re Snider*, *supra*, to the record facts in determining that greater prejudice would ensue to the proponents of substantive consolidation if that remedy were denied than would be suffered by the debtors through its imposition. Furthermore, the court's determination of the effect of the five objective factors (§ Nos. 64 (a), (b), (f) and (g)) as proper grounds for consolidation coincides with this Court's result upon review of the record and the applicable law. For the foregoing reasons, this Court AFFIRMS that portion of the Confirmation Order (CP 906), and the separate Order on Substantive Consolidation (CP 840), approving the substantive consolidation of the estates of the five debtors/appellants which are parties to the instant appeal.

In Paragraph 66 of the Bankruptcy Judge's Order on Remand (Page 40), it is stated:

"66. The Debtors have claimed prejudice, but have not proven it. . . . The debtors never demonstrated prejudice as an unavoidable consequence of substantive consolidation. . . .".

The burden of demonstrating prejudice more properly should have been placed upon the creditor/appellee. However, this Court has reexamined, in its totality, the entire record herein and by *de novo* consideration, has determined that there was ample evidence to demonstrate that, in fact, appellee had carried the burden of showing no prejudice to the appellants, notwithstanding the Bankruptcy court's findings that the debtors never demonstrated prejudice. Accordingly, the determination of the *Snider* principles have been appropriately applied and the burden is found to have been carried by appellee.

B. Equitable Subordination/Junior Classification

The second key element of the plan of reorganization confirmed by the Bankruptcy Court's Confirmation Order is the equitable subordination (or, as appellee chooses to characterize it, the junior classification) of certain creditor's claims, otherwise eligible for a higher priority, on the ground that they represented "insider" claims. The claims so subordinated include those of Miami Center Joint Venture and Olympia & York (Class 7) and the claims of the affiliated creditors which are the subsidiaries of debtor Holywell Corporation (Class 8). A third category of claims affected by the "equitable subordination" aspect of the confirmed reorganization plan are certain, so-called "super-priority" loans which were made by various debtors to MCLP with the express authorization of the Bankruptcy Court to supply necessary funds for the operation of the Miami Center during Bankruptcy Court proceedings, or to satisfy pressing tax obligations.

The Court has been especially sensitive to the equitable subordination aspect of this appeal and has therefore taken the utmost care in scrutinizing the record, the findings and conclusions relevant to this issue, and the treatment accorded this measure by the competing plans. After careful analysis of all the briefs and oral arguments received by the Court, it has become clear that appellants are really complaining about three sets of claims which were subjected to junior classification as a result of the Bankruptcy Court's rulings:

- 1.) The lease claims of Olympia & York and Miami Center Joint Venture (the "A and B leases") arising from their leases of furniture, fixtures and equipment (FF&E) to Miami Center Limited Partnership (MCLP).

- 2.) The lease claims of affiliated creditors Holywell Telecommunications Company and Holywell Leasing

Company (the "C and D leases") for FF&E leased to MCLP.

3.) The claims of debtors Gould and Holywell and of affiliated creditor Twin Development Corporation under their "super-priority loans" to MCLP.¹

Since each of these categories of subordinated claims involves a distinct group of creditors, the Court deems it appropriate to consider each in turn.⁷

(1) *The Lease Claims of Creditors—Olympia & York and Miami Center Joint Venture*

Miami Center Joint Venture and Olympia & York entered into certain lease agreements (the "A" and "B" Leases) whereby these entities leased furniture, fixtures and equipment to MCLP which were installed in the Miami Center. The validity of these leases (i.e., the fact and ruling that they are "true leases" as opposed to mere financing devices) was determined by the Bankruptcy Court in the course of an adversarial proceeding. (See Memorandum Decision dated June 24, 1985—CP 781.) The claims of O&Y and MCJV under these leases were explicitly subordinated to the claims of the nonaffiliated creditors (Class 6) by being placed under the confirmed plan in Class 7.

⁷ If this aspect of the confirmed Plan (i.e., equitable subordination or classification) rested solely on a review of the subordination of claims which the appellants herein had standing to pursue, this Court would be required to analyze the findings and conclusions relevant to subordination under the standard of *Matter of Mobile Steel Co.*, 663 F.2d 692, 700 (5th Cir. 1977). Such an analysis is not required here, however. For reasons that are set more fully herein, none of these three subordinated claims are in a procedural posture such that these appellants may properly raise them in the context of the instant appeal.

From the Bankruptcy Court's orders declaring the leases as "true leases" and subordinating the creditors claims under those leases, the respective *parties in interest* have taken appeals to the District Court. These appeals, which are currently pending before the Honorable C. Clyde Atkins, Senior U.S. District Judge, are:

— *Case No. 85-3230-CIV-ATKINS*: An appeal by creditors O&Y and MCJV from the Confirmation Order of the Bankruptcy Court, specifically objecting to the subordination of their lease claims under the confirmed plan.

— *Case No. 85-3430-CIV-ATKINS*: An appeal by the Bank of New York from the Memorandum Decision of the Bankruptcy Court (CP 781) which determined the "A" and "B" leases to be "true leases".

The appellants in the instant appeal have raised the objections of *those* creditors as a method of attacking the validity of the overall reorganization plan. However, the issue of whether the claims of O&Y and MCJV have been wrongly subordinated (or classified) is one which the debtors/appellants in the instant appeal lack standing to assert because they are not parties actually injured by this classification. *R.T. Vanderbilt Co. v. OSHA Rev. Comm.*, 708 F.2d 570, 574 (11th Cir. 1983). This issue is properly presented in the appeal before Judge Atkins, brought by the parties which are directly affected by the challenged ruling, and is therefore not a proper matter for adjudication by this Court. It is possible that as a result of Judge Atkins' ruling, the classification of this claim which Judge Atkins may grant, could possibly affect the Plan overall—but this is purely a contingency which may never occur and if it did, the Bankruptcy Judge would still be vested with jurisdiction to review the matter to ascertain a change or different classification as directed by Judge Atkins. On the other hand, Judge Atkins' ruling may require no change in classification.

(2) *The Lease Claims of Affiliated Creditors—Holywell Telecommunications Company and Holywell Leasing Company*

For the same reasons discussed above with regard to the "A" and "B" Lease claims, the appeals filed by creditors Holywell Telecommunications Company (HTC) and Holywell Telecommunications Company (HLC) and assigned to the Hon. James W. Kehoe (Case No. 85-3431-CIV-KEHOE) are matters for which the appellants before this Court lack standing. One of these leases affects the telephonic equipment installed in The Project by lease arrangement, and the other affects certain electronics and telecommunications equipment, including television cable. Clearly here, and with regard to the "C" and "D" leases, these matters involve parties other than the debtors and who are truly the *parties in interest* (affiliated creditors).

It should be noted that it is not, and has never been, the purpose of this Court to interfere in any way with the matters pending before these judges. In particular, as concerns the appeals before Judge Atkins, the determination of the validity of the "A and B" leases and the proper classification of the creditors' claims thereunder are matters not properly before this Court, so the instant order shall not affect those ongoing appeals.

(3) *The So-Called "Super-priority Loans"*

A third aspect of the proceedings in the Bankruptcy Court which the appellants contend had the effect of subordinating (or eliminating) claims deserving higher priority was the apparent elimination of a "super-priority" assigned, by orders entered in the Bankruptcy Court, to loans made to Miami Center Limited Partnership with the express authorization of the Bankruptcy Court. In their briefs to this Court, appellants have identified three such loans.⁶

⁶ The existence of the three authorized loans to Miami Center Limited Partnership from debtor Holywell Corporation, from debtor Theodore Gould, and jointly by Gould, Holywell and Twin

The confirmed Plan of Reorganization did not address the classification of these "super-priority" loans directly. It is the appellants' contention that the portion of the plan which provided for the substantive consolidation of the debtors' estates had the effect of eliminating these inter-debtor claims. The appellee counters that it is immaterial whether these claims were, in fact, subordinated (to Class 8) or retained their "superiority" status immediately junior to the Bank's mortgage lien, since any payment from one creditor to another leaves those funds in the combined pool which remains reachable by all the creditors of any debtor (likewise an effect of the substantive consolidation provision of the Confirmation Order).

The ultimate disposition of these "super-priority" liens is a pending matter yet to be decided by the Bankruptcy Court, and is therefore a matter not within the scope of the Confirmation Order which is the subject of this appeal. Because the record is silent as to how (and whether) these liens were subordinated or eliminated,

Development Corporation is not disputed by either party. Although larger amounts were authorized to be loaned to MCLP than were actually released from the cash collateral fund from which the loan proceeds derived, the record reflects the following actual transfers of funds:

Holywell to MCLP:	\$1,419,921.99
Gould to MCLP:	\$2,489,507.78
Twin Development, et al.:	\$ 615,757.91
	<u>\$4,525,187.68</u>

The "super-priority" which attached to these loans was a protection granted by the Bankruptcy Court's orders to preserve the priority (subject to the Bank's liens) of the claims of creditors of the individual debtors (i.e. Gould and Holywell). The significance of this "priority" was diminished by the substantive consolidation of the five debtors' estates, whereby creditors of Gould and/or Holywell could reach the assets of MCLP, the recipient of these loan proceeds. See Page 23, *infra*, with regard to further or future actions open before the United States Bankruptcy Court regarding these loans.

it is incumbent upon the Bankruptcy Court to resolve these questions after further adjudication. If the treatment accorded to these loans materially and adversely affects the rights of any *party in interest*, the terms of the Bank's Plan expressly permit any such party to assert a claim for relief from the consolidation provision [Article XIII, page 40, of the Plan; Debtors' initial appendix, page 090]. Under Article XIV(e) of the Plan [*Id.*, page 091], the Bankruptcy Court would have continuing jurisdiction to hear and determine any dispute regarding the appropriate treatment of these loan claims.

C. *Other Issues Presented on Appeal*

In addition to the two main elements of the confirmed Plan of Reorganization from which this appeal is taken, there have been raised several other aspects of the plan which, the appellants contend, warrant reversal.

(1) *The Authorization to the Liquidating Trustee to Dismiss a Pending Lawsuit Filed by the Debtors*

Since the inception of this appeal, the appellants have urged this Court to reverse the Confirmation Order on the ground that the confirmed plan called for the voluntary dismissal by the Liquidating Trustee of a civil action filed by the debtors (the District Court action, [See page 9-10, *supra.*]) On appeal, the debtors/appellants contend that the Bankruptcy Court was without authority to order the dismissal of that action, and that in doing so it unconstitutionally ousted the District Court from its proper jurisdiction.

In the first instance, the lawsuit was a chose in action which was part of the debtors' estate. 11 U.S.C. § 541 (a) (1). As such, it was within the power of the Bankruptcy Court to order its dismissal through the liquidating trustee. *In re Tidwell*, 19 Bankr. Rptr. 846 (E.D.

Va. 1982). Secondly, as a separate and independent ground for upholding this aspect of the plan, the Court notes that, upon the remand of this cause and upon the request of the appellants, the Bankruptcy Court performed a cost/benefit analysis of the value of this lawsuit to the debtors' estates, and concluded that its value was nil. This determination provides additional support for the inclusion in the confirmed plan of reorganization of the directive to the liquidating trustee to dismiss the District Court action.

As a further basis for this ruling, evidence adduced at a post-remand hearing held on January 18, 1986 showed that certain releases previously signed by the debtors effectively barred them from pursuing their civil action under principles of collateral estoppel. The Bankruptcy Court was within the scope of its authority in making this determination, as the debtors' right to pursue this action was a matter concerning the administration of the estates, and/or a counterclaim by the estate against persons filing claims against the estate, and/or confirmations of Plans, and/or other proceedings affecting the liquidation of the assets of the estate, etc., and therefore constituted a "core proceeding". 28 U.S.C. § 157(b) (2) (A), (C), (L), and (O).

(2) *The Valuation of the Property In The Debtors' Estates*

Appellants have objected throughout this appeal to the valuation assigned by the Bankruptcy Court, through confirmation of the Bank's plan, to the realty, improvements and FF&E which constitute the Miami Center property. The appellee has contended throughout that the valuation contained in the confirmed plan is the correct one; i.e., \$255,600,000. (Order on Remand, ¶ No. 51). The value proposed by the appellants for the property is \$275,000,000.

The Bankruptcy Court devoted a portion of its January 18, 1985 post-remand hearing to the issue of valuation, and heard testimony from appraisers hired by both sides who essentially defended the appraisals cited above. On the basis of such testimony, as well as the formal appraisals upon which its initial determination was made, the Bankruptcy Court confirmed the original valuation figure of \$255,600,000. This Court has reviewed the record evidence and has received written as well as oral argument on this issue. In light of such review, this Court concludes that the finding of the Bankruptcy Court as to the value of the Miami Center property was not clearly erroneous, and therefore will not be disturbed as a result of this Court's action.

(3) *The Priority of Claims Based On Mechanics' Liens*

In their initial brief on appeal, the debtors/appellants challenged the classification of certain claims filed by mechanics and materialmen who had furnished the Miami Center. In addition to the fact that the appellants in the instant appeal lack standing to raise those objections, events have occurred through the implementation of the confirmed plan of reorganization which render this issue on appeal moot; i.e., that all of these Class 4 claims have been paid by the liquidating trustee.

(4) *Unfair Classification of Certain Unsecured Creditors*

This previously asserted issue of appeal suffers from the identical infirmities discussed at paragraph (3), *supra*. First, the creditors allegedly injured by this misclassification are not parties to this appeal. Second, the liquidating trustee has likewise paid out all of these Class 6 claims (or reserved the funds to do so) which were the subject of this objection to the plan.

(5) *Amendment to the Plan of Reorganization Without Issuance of Disclosure Statements or Hearing*

In the last of their original issues on appeal, the debtors objected to the fact that late modifications to the Bank's Reorganization Plan were adopted shortly before entry of the Confirmation Order. These modifications (CP 564,614,709c, and 854) consisted of stipulations and amendments to the plan as filed. The purpose of these modifications was to provide for a trustee's certificate to repay the Bank of New York for any outlay required to acquire the FF&E which was the subject of the "A" and "B" leases. The Bankruptcy Court concluded (Order on Remand, ¶ No. 81) that these modifications did not prejudice the debtors, and that since the plan had been approved by the requisite number of creditors, disclosure to those classes which had rejected the plan was not required by 11 U.S.C. § 1127.

This Court agrees with the Bankruptcy Court's conclusion that the adoption of amendments to the plan of reorganization subsequently confirmed by that court did not violate the applicable provision of the Bankruptcy Code, did not prejudice these appellants, and therefore does not constitute a basis for reversing the Confirmation Order.

VIII. CONCLUSION

Having painstakingly reviewed the record in this appeal, the voluminous briefs, appendices and other submissions of counsel for the parties, having heard extended oral argument again on the merits of the appeal on March 10, 1986, having considered the Order on Remand entered by the Bankruptcy Court, the entire record herein, and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED that the Confirmation Order entered by the Bankruptcy Court on August 8,

1985, as amended by the entry of that court's Order on Remand on January 29, 1986, is hereby AFFIRMED; and thereupon, the Order approving Substantive Consolidation is likewise AFFIRMED.

AFFIRMED

DONE AND ORDERED in Chambers at Miami, Southern District of Florida this 20 day of March, 1986.

/s/ Sidney M. Aronovitz
SIDNEY M. ARONOVITZ
United States District Judge

Copy furnished to:

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APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 85-0228-Civ-Hoeveler

MIAMI CENTER LIMITED PARTNERSHIP, *et al.*,
Plaintiffs,

—vs—

THE BANK OF NEW YORK, *et al.*,
Defendants.

FINAL ORDER OF DISMISSAL WITH PREJUDICE

[Filed April 30, 1986]

THIS CAUSE having come before the Court upon the Motions to Dismiss filed by all defendants, and the Court being fully advised in the premises and having heard argument in the matter,

IT IS ORDERED AND ADJUDGED that this cause be, and the same is, hereby dismissed with prejudice.

The Court quotes from the dispositive ruling made by Judge Aronovitz in Case No. 85-3225-Civ.-Aronovitz (S.D.Fla., March 20, 1986) at 24-25:

. . . [T]he appellants [plaintiffs in the instant cause] have urged this Court to reverse the Confirmation Order on the ground that the confirmed plan called for the voluntary dismissal by the Liquidating Trustee of a civil action filed by the debtors (the District Court action . . .). On appeal, the debtors/appellants contend that the Bankruptcy

Court was without authority to order the dismissal of that action, and that in doing so it unconstitutionally ousted the District Court from its proper jurisdiction.

In the first instance, the lawsuit was a chose in action which was part of the debtors' estate. 11 U.S.C. § 541(a)(1). As such, it was within the power of the Bankruptcy Court to order its dismissal through the liquidating trustee. *In re Tidwell*, 19 Bankr. Rptr. 846 (E.D.Va.1982). Secondly, as a separate and independent ground for upholding this aspect of the plan, the Court notes that, upon the remand of this cause and upon the request of the appellants, the Bankruptcy Court performed a cost/benefit analysis of the value of this lawsuit to the debtors' estates, and concluded that its value was nil. This determination provides additional support for the inclusion in the confirmed reorganization of the directive to the liquidating trustee to dismiss the District Court action.

As a further basis for this ruling, evidence adduced at a post-remand hearing held on January 18, 1986 showed that certain releases previously signed by the debtors effectively barred them from pursuing their civil action under principles of collateral estoppel. The Bankruptcy Court was within the scope of its authority in making this determination, as the debtors' right to pursue this action was a matter concerning the administration of the estates, and/or a counterclaim by the estate against persons filing claims against the estate, and/or confirmation of Plans, and/or other proceedings affecting the liquidation of the assets of the estate, etc., and therefore constituted a "core proceeding". 28 U.S.C. § 157(b)(2)(A), (C), (L), and (O).

Accordingly, this dismissal is an administrative necessity, for the actual decision has been compelled by the

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decision of the Bankruptcy Court below and the affirmation of that decision by Judge Aronovitz.

DONE AND ORDERED this 30th day of April, 1986
in Chambers at Miami, Florida.

/s/ Wm. W. Hoeveler
United States District Judge

Copies furnished to counsel of record

APPENDIX F

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA**

Case No. 84-01590-BKC-TCB
Case No. 84-01591-BKC-TCB
Case No. 84-01592-BKC-TCB
Case No. 84-01593-BKC-TCB
Case No. 84-01594-BKC-TCB

Chapter 11

**IN RE: HOLYWELL CORPORATION,
MIAMI CENTER LIMITED PARTNERSHIP,
MIAMI CENTER CORPORATION,
CHOPIN ASSOCIATES, and THEODORE B. GOULD,**
Debtors,

ORDER ON REMAND

The District Court Order of Remand dated December 30 reached this court on January 6 (C. P. No. 1145). It requires that one or more hearings be held, proposed findings and conclusions be entertained, and that this court not later than January 29:

“make and enter such findings of fact and conclusions of law as are necessary to provide the District Court with an adequate basis to decide the . . . appeal on the merits.”

At a conference held January 14, the debtor requested and on January 18 the court held an evidentiary hearing to receive additional evidence on three issues: (a) the value of the Miami Center Project, (b) the value to the estate of a lawsuit pending before Judge Hoeveler, and (c) amount of the Bank's lien. The parties also re-

quested leave to submit their proposed findings and conclusions by January 23. The parties agreed that no other hearings were necessary.

Although counsel for MCJV and O&Y attended both hearings, neither they nor any party other than the debtors and the Bank participated.

On January 23, both the debtors (C. P. No. 1175) and the Bank (C. P. No. 1176) submitted comprehensive and detailed proposed findings and conclusions, respectively 43 and 52 pages in length.¹ In addition, the debtors filed on January 28 the debtors' 22-page response to the Bank's proposed findings and conclusions.

I presume counsel understand what will best assist Judge Aronovitz. Recognizing the weight accorded to adopted findings, *Anderson v. Bessemer City*, 470 U.S. —, 84 L.Ed.2d 518, 527 (1985), I have used the time available to me to review carefully the proposed findings and conclusions and the debtors' Response together with the entire record, instead of attempting to reword and retype forty to fifty pages of similar detail. For the most part the facts flow from uncontroverted matters of record. The parties differ in the emphasis they give and the inferences they draw from the undisputed events.

I reject the proposals of the debtors as reflecting in essential respects the contentions I considered and rejected previously. I adopt the Bank's proposed findings of fact and conclusions of law, copies of which are attached and incorporated in this Order. They accurately represent my own considered conclusions as to both the facts and legal principles implicit in the Confirmation Order of August 8, 1985 (C. P. No. 906) and the earlier

¹ Official Form 31, prescribed by the Judicial Conference pursuant to Bankruptcy Rule 9009 as the form for a chapter 11 Order Confirming Plan, is a page and a half and contains only the eight statutory requirements of 11 U.S.C. § 1129(a) rephrased as mixed

Consolidation Order (C. P. No. 840). The earlier order followed one session of the extended confirmation hearing and resolved one bitterly contested element of the confirmation issues. It was not possible, in this case, to hear all the issues and parties during one uninterrupted session.

In a matter of this magnitude, fought as hard as this one has been, it is easy to lose sight of the forest while concentrating on the trees. Neither this review, the additional evidence tendered, nor the subsequent events have caused me to recede from the decisions I reached after spending a year with all the parties and the issues they presented, which I attempted to put into perspective in the Confirmation Order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW UPON REMAND

[Proposed by the Bank of New York].

Findings of Fact

A. Parties

1. The debtors are Holywell Corporation, a Delaware corporation ("Holywell"), of which debtor Theodore B. Gould ("Gould") is the sole stockholder and president; Miami Center Limited Partnership, a Florida limited partnership ("MCLP") of which Gould and debtor Miami Center Corporation ("MCC") are sole general partners and are also limited partners; MCC, a Florida corporation and wholly-owned subsidiary of Holywell (Gould is also president of this entity); Chopin Associates, a Florida general partnership ("Chopin") of which Gould and MCC are the sole general partners; and Gould himself.

2. The Bank was the construction lender for Phase I of the debtors' "Miami Center" complex. That Phase consists of the Edward Ball Office Building, the Pavillon Hotel, retail space between them known as the "Podium",

and an adjoining parking garage (collectively, the "Miami Center Project"). The Bank has its offices in New York, New York, and is chartered under the laws of the State of New York.

3. Miami Center Joint Venture ("MCJV") is a Florida general partnership formed by debtor Gould and Olympia & York Florida Equity Corp. ("O&Y"), a Florida corporation established by a large Canadian real estate development company. At all material times, Gould served as "managing venturer" and general partner of MCJV. MCJV owns four vacant lots near the Phase I Project. Gould and O&Y originally planned to construct Phases II and III of Miami Center on those lots, but disputes and litigation between the two partners prevented any such construction.

4. Holywell Leasing Company ("HLC") and Holywell Telecommunications Company ("HTC") are two of numerous non-debtor subsidiaries wholly owned by debtor Holywell (wholly owned, in turn, by Gould). Gould was president of each at all material times.

5. Over 400 other creditors have an interest in these proceedings, including the IRS, the Dade County Tax Collector, many of the contractors and subcontractors involved in the construction, former employees, and others. Creditors' committees were appointed by this Court, and have been active, for the Holywell, MCLP, and MCC estates.

B. *Jurisdiction*

6. This Court has jurisdiction over these reorganization proceedings and over the parties pursuant to 28 U.S.C. § 157, the standing order of reference in this District, and the Order of Remand.

C. *The Debtors' Plans*

7. The debtors filed a separate, amended disclosure statement and plan for each estate; however, all were

nearly identical in form and substance [C.P. No. 466-470].

8. The debtors' plans were predicated upon:

(a) the sale of the Miami Center Project to Hadid Investment Group, Inc. ("Hadid") for \$260 million;

(b) the payment of undisputed claims from approximately \$32 million realized by Holywell, a wholly-owned subsidiary, and Gould in January, 1985 from the sale of other real estate in the Washington, D.C. area (by Order entered December 31, 1984, C.P. No. 303, such funds were determined to be cash collateral under 11 U.S.C. § 363, subject to the Bank's first lien);

(c) the pursuit in the District Court of a lawsuit against the Bank and its participating lenders (*Miami Center Limited Partnership, et al. v. The Bank of New York, et al.*, Case No. 85-0228-Civ-Hoeveler; the "District Court Action") for alleged fraud, usury, breach of contract, and civil claims under the federal RICO act; and

(d) equitable subordination of the Bank's construction loan and mortgages under 11 U.S.C. § 510(c).

D. *Objections to the Debtors' Plans*

9. Objections to the debtors' amended plans were filed by:

(a) O&Y [C.P. No. 533], upon the grounds that:

(1) the debtors' plans were based on a "wholly speculative agreement" with Hadid, "replete with holes and contingencies";

(2) O&Y and MCJV, "would be subjected to continuing delays, mounting costs and interest charges", and:

The past record of the Debtors, and notably of Mr. Gould as the controlling and dominating person, is replete with evidence of unfounded representations,

commitments and undertakings breached, and a myriad of obligations, assurances and agreements unfulfilled and repudiated. The record in these very proceedings, reflect the repeated experiences of partners and creditors with such abandoned commitments and undertakings.

[*Id.*, Paragraph 3];

(3) "Gould, as proponent of the Debtors' consolidated plans, in light of his loss of credit and credibility in the real estate and financial markets, is perhaps the least likely prospect to achieve a prompt sale and disposition of the properties concerned and a discharge of the claims of creditors." [*Id.*, Paragraph 5];

(4) the debtors' plans classified the O&Y claims "in a separate and subordinate class", below those of other unsecured creditors;

(5) the debtors' plans lacked "sufficient funds . . . to provide for the repayment of all of [O&Y's] claims";

(6) the debtors' plans failed to provide for the discharge of the claims of O&Y under two agreements covering certain furniture, fixtures and equipment (the "FF&E"); and

(7) the debtors' plans failed to provide for the payment of debtor Holywell's liability, "to MCJV and [O&Y] of an amount of approximately \$1.7 million . . . arising from Gould's and Holywell's acts of diversion and misappropriation" [*Id.*, Paragraphs 13 and 14].

(b) the Bank [C.P. No. 535], upon the grounds that:

(1) the debtors' plans were misleading, and were based upon contingencies unlikely to materialize and requiring years of litigation to resolve;

(2) the debtors' plans failed to meet the "best interest of creditors" (Section 1129(a)(7)), feasibility (Section 1129(a)(11)), and "cram down" (Section 1129(b)(1)) requirements under the Code; and

(3) the debtors' "equitable subordination proposal in respect to the Bank's liens was moot in light of this Court's March 20, 1985 decision [C.P. No. 20 in Adv. Pro. No. 85-0160-BKC-TCB-A] holding that two releases executed by the debtors in favor of the Bank and its participating lenders) barred the debtors' claims of wrongdoing.

(c) the MCC and MCLP Creditors' Committees [C.P. No. 567], upon the grounds that:

(1) the debtors' plans were not feasible, because the Hadid contract was "not a true and valid offer";

(2) the matter of equitable subordination of the Bank's claim had been adjudicated against the debtors;

(3) the debtors' plans would eliminate the estates' equity because of the accrual of interest on the Bank's mortgages during the litigation and the Hadid contract delays;

(4) the debtors' plans unfairly discriminated against creditors and were not fair and equitable;

(5) the debtors failed to comply with 11 U.S.C. § 1129 (a) (5) (A) (i); and

(6) the debtors made solicitations of creditors through improper "telephone calls and a mailgram, which did not truthfully represent the facts", attempting in bad faith to obtain acceptances, in contravention of 11 U.S.C. § 1126(e).

(d) Julian J. Studley, Inc. [C.P. No. 526], an unsecured creditor, because of the improper classification of its claims and failure to comply with 11 U.S.C. § 1123 (a) (4).

(e) the Holywell Creditors' Committee [C.P. No. 516], upon the following grounds:

(1) the "illusory" nature of the debtors' plans because, "they do not present a binding contract with a purchaser,

but represent merely an option to a real estate broker which can be extended through September, 1985, under the Contract", and the "down payment" was merely a promissory note; and

(2) the debtors' plans would entail substantial delays because of (i) the "study period" and extensions under the Hadid contract and (ii) the litigation involved in the attempt to subordinate the Bank's claims.

E. *The Bank's Plan*

10. The Bank filed an amended, consolidated disclosure statement and plan [C.P. No. 478] which was further amended [C.P. No. 854] during the course of the confirmation proceedings. The Bank also entered into certain stipulations with the Creditors' Committees [C.P. No. 564, 614, 709c, and 876a]. Neither the stipulations nor the second amendment to the Bank's plan adversely affected any party other than the Bank.

11. The central features of the Bank's amended, consolidated plan are:

(a) the purchase by the Bank (or its designee) of the Miami Center Project, including the FF&E, for its MAI-appraised value of \$255.6 million, comprised of (i) satisfaction of the Bank's judgment lien, computing interest at the contract or "good standing" rate rather than the higher default rate, and (ii) the balance, after closing adjustments and prorations, in new cash;

(b) the establishment of the "Miami Center Liquidating Trust", consisting of all other assets of the debtors, for the payment of all other claims by a court-appointed Liquidating Trustee;

(c) the release by the Bank of its cash collateral (approximately \$30 million), for addition to the new cash generated by the sale of the Miami Center Project (approximately \$13.6 million), with the combined funds to

be used by the Liquidating Trustee to pay the claims of all other creditors;

(d) a further financing commitment of approximately \$14.4 million by the Bank for payment of the claim of MCJV for the FF&E, (i) if and when such claim is allowed over the Bank's pending objections, (ii) to the extent other assets of the Liquidating Trust prove insufficient to pay the claim, and (iii) if it is ultimately determined that MCJV has been damaged by its (allegedly) improper classification under the Bank's plan;

(e) dismissal of the District Court Action by the Liquidating Trustee; and

(f) the consolidation of all five estates in a manner such that the unaffiliated creditors of Holywell are paid first, the unaffiliated creditors of the other debtors are paid next, and the many inter-debtor and related party claims are paid thereafter.

F. Objections to the Bank's plan

12. Objections to the Bank's Plan were filed by:

(a) the Holywell Creditors' Committee [C.P. No. 515], but these objections were subsequently withdrawn by stipulation [C.P. No. 614, paragraph 6];

(b) O&Y [C.P. No. 532, 817a, 871], upon the grounds that:

(1) the Bank's plan assumes title to the MCJV FF&E without adequate and priority payment of sums allegedly due under the FF&E agreements; and

(2) the Bank's plan, "fails to provide for payment of Gould's and Holywell Corporation's obligations to O&Y through MCJV of an amount of approximately \$1.7 million . . . arising from Gould's and Holywell's acts of diversion and misappropriation . . .".

(c) Shutts & Bowen, a creditor and law firm representing the debtors [C.P. No. 537a], upon the grounds that:

(1) the Bank's plan is "unfairly discriminatory and is not fair and equitable" to impaired classes;

(2) the Bank's valuation of assets and claims is erroneous;

(3) the Bank's plan assumes liabilities of MCJV;

(4) the Liquidating Trust is violative of 11 U.S.C. § 1129(5)(A)(i); and

(5) the plan's priority scheme does not comply with 11 U.S.C. § 1129.

(d) MCJV [C.P. No. 808], though comprised of Gould and O&Y, in separate objections alleging that the plan fails to provide proper payment and priority for the MCJV FF&E claims.

(e) the debtors [C.P. No. 534, 545, 580, 849, and 888a], upon the grounds that:

(1) the Bank's plan fails to pay in full for the FF&E;

(2) the Bank's plan deprives mechanics' lien claimants of their security;

(3) the Bank's plan and disclosure statement are misleading;

(4) substantive consolidation would only result in "unjust enrichment" to the Bank and other creditors;

(5) the Bank's plan would cause the limited partners to lose their investment and to become liable for additional taxes;

(6) the District Court Action would be "summarily" dismissed, "without due process of law"; and

(7) the appointment of a Liquidating Trustee violates 11 U.S.C. § 1104(a).

G. *Voting by the Creditors*

13. After the debtors' and the Bank's disclosure statements were approved, and pursuant to this Court's order

[C.P. No. 405], separate ballots for the debtors' plans and for the Bank's plan were transmitted to all creditors for return by April 29, 1985. On that date, the Court held an initial confirmation hearing and, with the assistance of counsel, established a procedure for the tabulation of the ballots and for certification by the plan proponents of the availability of all funds necessary for consummation should a plan be confirmed [C.P. No. 611, 612, 619].

14. The requisite certificates respecting the voting and the funding were filed by each side on May 13, 1985, as directed [C.P. No. 658-664], and were reviewed by the Court.

15. The voting indicated overwhelming support for the Bank's plan among the creditors, and rejection of the debtors' plans. Creditors in Classes 1 through 6 approved the Bank's plan by well over the minimum margins required (one-half in number and two-thirds in dollar amount, per 11 U.S.C. § 1126(c)). However, O&Y and MCJV (Class 7 under the Bank's plan), certain wholly-owned subsidiaries of Holywell controlled by Gould (Class 8), and the debtors themselves (Class 9), voted against the Bank's plan. Accordingly, the Court was required to determine whether the plan met the requirements of 11 U.S.C. § 1129(b).

H. *Establishment of the Bank's Lien*

16. In order to establish the amount, validity, and priority of its lien over the debtors' property, the Bank filed an adversary proceeding against the debtors (Adv. Pro.No. 85-0160-BKC-TCB-A).

17. The debtors sought a stay of the scheduled trial of the lien proceeding (a) initially in the Bankruptcy Court [C.P. No. 3A in Adv.Pro. 85-0160], and (b) then in the District Court Action. Both Courts refused to enter such a stay, and the trial went forward as scheduled.

18. That proceeding culminated in the entry by this Court of:

(a) a final judgment in favor of the Bank for principal and interest of \$234,342,742.93, plus interest of over \$75,000 per day from March 14, 1985, forward [C.P. No. 21 in Adv.Pro. 85-0160]; and

(b) a memorandum decision upholding the two releases executed by the debtors in favor of the Bank (and its participating lenders), and determining that those releases barred the fraud, breach of contract, usury, and RICO theories raised by the debtors as purported defenses in this Court and as claims in the District Court Action [C.P. No. 20 in Adv.Pro. 85-0160].

At the remand hearing on January 18, 1986, the debtors presented evidence which purported to show a discrepancy in the amount of the Bank's lien. However, since that amount has been embodied in a final judgment [C.P. No. 21 in Adv. Pro. 85-0160] that is now on appeal before the District Court (*Gould et al. v. The Bank of New York, Case No. 85-2263-Civ-NCR*), the Court will not revisit that issue. The Court has also been directed to the debtors' brief in that appeal which states, at page 23, that the debtors, "do not contest that the principal amount advanced by The Bank of New York is \$196,711,481.58", exactly the amount set forth in the final judgment [transcript of hearing of January 18, 1986, page 11].

I. *The FF&E Leases*

19. Next, as part of the continuing confirmation process, the parties advised the Court that characterization of two agreements, relating to the FF&E and between MCJV and MCLP (debtor Gould was managing general partner of each), as "true leases" or as "financing agreements" could be dispositive of the FF&E claims asserted by O&Y and MCJV. The Bank filed [Adv.Pro.No. 85-0566-BKC-TCB-A] an adversary proceeding against the affected parties seeking a determination of the nature (secured

or unsecured), extent, and value of such claims. The Bank also filed an objection to the FF&E claim filed by O&Y and MCJV [C.P. No. 811], which remains pending.

20. After an evidentiary hearing, the Court entered an extensive memorandum opinion [C.P. No. 26 in Adv. Pro. 85-0566] holding that the two agreements were "true leases" (and, therefore, that MCJV owned the FF&E subject to debtor MCLP's option rights under the leases). The Court was not asked to, and did not, determine in that proceeding the priority of MCJV's claim or the proper amount of that claim assuming exercise of MCLP's option to acquire the FF&E (as provided by the Bank's plan).

J. Substantive Consolidation

21. Thereafter, the parties furthered the confirmation process by noticing an evidentiary hearing upon the debtors' objections to the substantive consolidation feature of the Bank's plan. Both sides presented evidence and argument [C.P. No. 844] on the issue.

22. The Court determined, based upon facts and authorities detailed below (Paragraphs 29-41 and 58-67), that substantive consolidation is in the best interest of creditors, is not prejudicial to the debtors, and is appropriate on the record before the Court [Consolidation Order, C.P. No. 840]. Under the plan, the creditors have received or will receive more than they would in liquidation. 11 U.S.C. § 1129(a)(7).

K. Further Hearings

23. During the confirmation process (April 29 through August 8, 1985), the Court held numerous other hearings and invited counsel to submit such memoranda and request such hearings as they might deem appropriate or necessary to supplement the already-voluminous record before the Court. During that time, no further evidentiary hearings were requested.

24. However, pursuant to the Order of Remand and the written request of counsel for the debtors, a further evidentiary hearing was conducted on January 18, 1986, for the submission of evidence regarding:

- (a) the value of the Miami Center Project;
- (b) the value or "cost/benefit" of the District Court Action; and
- (c) the calculation of the Bank's lien.

L. Findings As to the Debtors' Plans

25. At the instance of the Bank, the deposition of the President of Hadid Investment Group, Inc. (the proposed purchaser of the Miami Center Project for \$260 million under the terms of the debtors' plans), Mohammed A. Hadid, was taken on April 19, 1985 [C.P. No. 649]. Hadid's testimony and the deposition exhibits demonstrate, and the Court finds, that:

- (a) the Hadid contract had no fixed closing date, and was little more than an open-ended option;
- (b) Hadid was still searching for a principal to finance or acquire the Project under the contract, and did not have the wherewithal independently to close the purchase;
- (c) Hadid and any such principal would not deal with the Project until the "cloud of bankruptcy" was removed; and
- (d) the "down payment" was a mere promissory note of dubious enforceability.

26. As is evident from the results of the voting (see Paragraphs 14 and 15, *supra*), numerous classes of creditors voted against the debtors' plans.

27. The "equitable subordination" of the Bank's judgment, as proposed by the debtors, would not have been permitted because the debtors had specifically released any

and all such claims against the Bank and its participating lenders [C.P. No. 20 in Adv.Pro. 85-0160].

28. The debtors' numerous disputes and litigation on nearly every front—with the IRS, the City of Miami, the *ad valorem* tax authorities, the general contractor, the debtors' former lawyers, the former hotel operator (Trusthouse Forte), O&Y, the leasing agent (Julian J. Studley, Inc.), prospective tenants, and the Bank—would have continued or even increased under the debtors' plans, such that the funds of the estates otherwise available for the payment of claims to creditors would have been substantially eroded by legal fees and other costs of litigation. All such litigation is detailed in the debtors' amended schedules [C.P. No. 275-278] and disclosure statements [C.P. No. 377-381]. It is likely that consummation of the debtors' plans would have been followed by liquidation or by a need to further reorganize. 11 U.S.C. § 1129(a) (11).

M. Findings on Substantive Consolidation As Proposed by the Bank's Plan.

29. All of the Creditors' Committees supported substantive consolidation. No creditor (except for those controlled by Gould) objected to substantive consolidation.

30. Gould's testimony at deposition, to which the Court was directed at the hearing on substantive consolidation [C.P. No. 385h], was:

Q: Is it fair for us to conclude that Holywell, the parent company, is the ultimate beneficiary of any and all profits that these companies make?

A: [Mr. Gould]: Yes, it is. [Page 31].

* * * *

Q: Has it been customary for these interrelated companies to move money back and forth?

A: Yes. [Page 202].

* * * *

Q: Did either of these two corporations operate at a profit?

A: All of them did.

Q: All of that money was divided up to Holywell?

A: Yes.

Q: Then you, as the sole stockholder in Holywell, got a dividend from Holywell?

A: No. All the funds during the past four years have been loaned to this project.

Q: Holywell—

A: All of the funds that Holywell has earned during the past four years have been loaned to the Miami Center Limited Partnership. [Page 55].

Moreover, the debtors specifically asked the Court to approve (and the Court did approve) as undisputed liabilities of the debtors, payments to terminated employees of Holywell's wholly-owned subsidiaries: Parkwell, Inc.; Parkwell of Florida; Holywell Construction Co.; Holywell Telecommunications Co.; Florida Viking Properties; Orion Engineering Services; Whitehall Building Services; Whitehall Security Corp.; and Holywell Hotels, Inc. [C.P. No. 609, Exhibit "B"]. All such employees performed services for the Miami Center Project owned by debtors MCLP and Chopin.

31. The debtors' schedules [C.P. No. 275-278] show, and the debtors have never disputed that:

(a) Gould owns 100% of debtor Holywell;

(b) Gould is jointly and severally liable for all of the debts of debtor MCLP and of debtor Chopin because he is a general partner of each (Sections 620.62 and 620.625, Florida Statutes);

(c) Holywell owns 100% of debtor MCC and of Holywell's numerous other subsidiaries; and

(d) MCC is also jointly and severally liable for all debts of MCLP and Chopin, because MCC is a general partner of each.

32. The debtors' outside accountant testified, and the Court thus finds, that Holywell's financial statements were consolidated with those of debtor MCC [C.P. No. 844, pages 37-38].

33. The debtors cross-guaranteed each other's liabilities to the Bank and to various other creditors. Many creditors filed claims against the wrong debtor or debtors as a result. For example:

(a) Holywell Construction Company, a wholly-owned subsidiary of debtor Holywell, was "an agent of [debtor] Miami Center Limited Partnership" [C.P. No. 788, page 37; see also page 100].

(b) Holywell Real Estate Corporation, another of the many wholly-owned subsidiaries of debtor Holywell, entered into a contract for work at Miami Center that was always to be paid by debtor MCLP [Id. at page 45; the Court held debtor Holywell liable].

(c) The State of Florida, Department of Labor, believed its claims were against "Holywell Hotels, Inc., trading as Pavillon Hotel", rather than against debtor Holywell [Id. at page 99].

(d) Debtor MCLP acknowledged indebtedness for purchases made by Whitehall Security Corporation, another wholly-owned subsidiary of debtor Holywell [Id. at page 104].

(e) Debtor Holywell furnished credit information in support of credit extended for purchases by debtor MCLP, and was invoiced for those purchases [Id. at 123-29].

(f) A Miami law firm invoiced debtor Holywell for services allegedly obtained for debtor MCLP, apparently by Holywell Construction Company [Id. at 147-49].

34. The creditors filed overlapping claims because of their confusion. The debtors objected to over 300 claims on the grounds that the claims were filed against the wrong debtors [C.P. No. 577-579, 584-86, 588, 589].

35. The schedules claim the following inter-company indebtedness, among others, between various debtors and their wholly-owned subsidiaries:

(a) MCLP owes Holywell \$4,080,395.21.

(b) MCLP owes Holywell's wholly-owned subsidiary "Charleston Center Corp." \$2,067,801.71.

(c) MCLP owes debtor Chopin \$11,528,389.33.

(d) MCLP owes Holywell's wholly-owned subsidiary "Holywell Construction Co." \$500,832.12.

(e) MCLP owes Holywell's wholly-owned subsidiary "Holywell Hotels, Inc." \$1,923,862.81.

(f) MCLP owes Holywell's wholly-owned subsidiary "Holywell Management Co." \$222,004.55.

(g) MCLP owes Holywell's wholly-owned subsidiary HTC \$64,489.59.

(h) MCLP owes Holywell's wholly-owned subsidiary "Orion of Washington" \$499,333.00.

(i) MCLP owes Holywell's wholly-owned subsidiary "Orion Engineering Services" \$275,704.74.

(j) MCLP owes Holywell's wholly-owned subsidiary "Parkwell, Inc." \$114,249.21.

(k) MCLP owes Holywell's wholly-owned subsidiary "PBA Architects, Inc." \$856,709.17.

(l) MCLP owes Holywell's wholly-owned subsidiary "Pietro Belluschi, Inc." \$300,833.

(m) MCLP owes Gould \$2,215,539.09.

(n) MCLP owes Holywell's wholly-owned subsidiary "Whitehall Building Services, Inc." \$26,385.47.

(o) MCLP owes Holywell's wholly-owned subsidiary "Whitehall Security Corp." \$1,543,938.86.

(p) Gould owes Holywell \$1,750,000 plus interest.

(q) Holywell is owed the following by its wholly-owned subsidiaries:

Charleston Center Corp.	\$1,814,066.09
PBA, Inc.	1,201,578.97
TBG Institute	1,199.00
Parkwell of Florida	1,937.54
Whitehall Security Corp.	2,535.35
Whitehall Building Services, Inc.	7,617.15
Orion Engineering	3,359.28
Holywell Management	59,724.88
Racing Club	82,597.81
Holywell Hotels, Inc.	5,000.00
Holywell Trading	834.35
Holywell Real Estate	137,784.49
Holywell Telecommunications Co.	471,115.39
Holywell Insurance Company	10,541.46
Studley/Holywell Associates, Inc.	30,493.08

36. The foregoing intercompany indebtedness exceeds \$31,800,000. Since Gould controlled both the purported obligor and the obligee with respect to each such liability, and since he admitted on deposition that he advanced all of the income from all of the debtors through Holywell to assist with MCLP's development of the Miami Center Project [See Paragraph 30, *supra*], such advances cannot be characterized at arms'-length or as founded upon adequate consideration.

37. Exhibit 4, Question 19b, in Holywell's Statement of Financial Affairs [C.P. No. 275] indicates that Gould paid himself (because he owned and controlled Holywell) \$1,051,844.67 from debtor Holywell's cash during the 11-

month period before the bankruptcy, and that Holywell made a loan of \$1,750,000 to Gould on October 14, 1983. During the hearing on this issue on July 18, 1985, Holywell's chief financial officer conceded [C.P. No. 844, page 57, lines 19-24] that the Holywell-Gould loans were not evidenced by a written note. Schedule B-2 to the Statement of Financial Affairs shows that Holywell owned 100% of 19 different subsidiaries (only one, MCC, is a debtor), and that 14 of those subsidiaries allegedly owed money (about \$3.8 million) to Holywell.

38. MCLP's Statement of Financial Affairs [C.P. No. 276] also reflects numerous inter-debtor transactions and debts (most are summarized at Paragraph 35, *supra*). MCLP, though admittedly in default under its loans with the Bank at the time, paid Holywell over \$1.2 million [*Id.*, Exhibit 13(a)] in the seven months preceding the bankruptcies.

39. MCC's schedules [C.P. No. 277, Schedule B-2] show that Holywell owed MCC \$898,779, and that MCC (wholly owned by Holywell) owned a 47.88% partnership interest in MCLP and a 64% partnership interest in debtor Chopin. The schedules also confirm [Schedule A-2] that MCC is liable as a general partner for the debts of MCLP and of Chopin.

40. Gould's schedules [C.P. No. 278, Schedule A-1] show claims against him by the IRS of over \$2.5 million because (a) Gould was an officer of debtor Holywell's wholly-owned subsidiaries Holywell Construction Company and Holywell Hotels, Inc., and (b) he failed to cause those entities to pay federal withholding taxes. The schedules also admit [Schedule A-2] Gould's liability as general partner for MCLP's debts (other than any non-recourse mortgages) and for Chopin's debts. Finally, Gould listed ownership [Schedule B-2] of 17% of MCLP and 36% of Chopin.

41. Thus, debtor Gould owned all of debtor Holywell, which in turn owned all of debtor MCC. Gould therefore

owned, directly or indirectly through Holywell and MCC, general and limited partnership interests constituting 64.88% of MCLP and 100% of Chopin. The debtors have never disputed that Gould personally controlled all five of the co-debtors.

N. Findings on Classification Under the Bank's Plan

42. The objections relating to the classification structure of the Bank's plan came only from entities which Gould controlled (MCJV, of which he was "managing venturer" and general partner, and HTC and HLC, of which he was president—and which he owned through his 100% ownership of Holywell), or with whom he was a partner (O&Y and the minority limited partners of MCLP).

43. The claims of MCJV and O&Y were classified as "Class 7" under the Bank's plan, junior in priority of distribution to the claims of general unsecured creditors that were not affiliated with Gould (Class 6). The MCJV and O&Y claims are not substantially similar to the claims of those unaffiliated creditors, because;

(a) Any distribution to MCJV increases the value of debtor Gould's 50% equity in MCJV;

(b) MCJV has recourse to Gould's equity interest in MCJV's valuable real estate, while the unaffiliated unsecured creditors have no such recourse (the MAI appraisal filed by the debtors indicated that the four unimproved parcels owned by MCJV were worth \$104 million [C.P. No. 149, Exhibit "C"; also of record at C.P. No. 822, Exhibit "A"], while the liabilities of MCJV have been represented to be approximately \$60 million;

(c) the MCJV claim was asserted by a purported creditor (MCJV) controlled by a debtor (not the case for any Class 6 creditor); and

(d) similarly, O&Y stands to realize 50% of any distribution to MCJV, and has recourse against Gould's

50% equity in MCJV, for O&Y's claims against the debtors.

44. Similarly, the claims of HTC and HLC (each wholly owned by debtor Holywell and controlled by Gould), assigned to Class 8, are substantially dissimilar to the claims of the unaffiliated, Class 6 unsecured creditors. 100% of any payment to HTC or HLC directly benefits (and is readily available to) debtors Holywell and Gould. Payments to unaffiliated creditors, on the other hand, do not result in any other direct or indirect benefit to any debtor.

45. The limited partners of MCLP hold equity interests rather than claims, and were assigned to Class 9. Such interests are not substantially similar to the claims of any of the senior classes under the Bank's plan.

O. Findings on Equitable Subordination

46. The entities affiliated with Gould and objecting to classification junior to the claims of general unsecured creditors have consistently maintained that this Court lacked a sufficient factual basis to equitably subordinate such claims. The Order of Remand directed the Court to enter detailed findings on the issue. As the conclusions of law demonstrate (see Paragraphs 68-74, *infra*), the Court approved the junior classification accorded such claims by the Bank's plan because the Court found that those claims were not substantially similar to the claims of the senior classes (as specified by 11 U.S.C. § 1122) that had no such affiliation with the debtors.

47. So that the record is clear, however, the factual prerequisites for equitable subordination of the MCJV, O&Y, HTC, and HLC claims are also established by the record. Gould engaged in inequitable conduct, including:

(a) The payment of enormous sums of money to himself (see Paragraph 37, *supra*), at a time when he was refusing to pay numerous unaffiliated creditors of all of the debtors;

(b) conflicts of interest resulting from his control of both lessor and lessee under the MCJV-MCLP FF&E agreements, the HTC-MCLP FF&E agreement, the HLC-MCLP FF&E agreement, and the Chopin-MCLP ground lease; and

(c) his failure to pay withholding taxes for Holywell Hotels, Inc. and Holywell Construction Company (see Paragraph 40, *supra*), with the result that his estate was charged for the \$2.5 million in penalties under 26 U.S.C. § 6672, to the detriment of creditors.

48. Gould's misconduct injured his creditors and, but for the substantive consolidation of the five estates and junior classification of the related-party claims as provided by the Bank's plan, Gould's inter-company liabilities would have permitted Gould, and non-debtor entities controlled by him, to receive distributions from the "cash-rich" estates (the Gould and Holywell estates, if contingent liabilities are disregarded), while unaffiliated creditors of the cash-poor estates (principally MCLP) would have received dividends (if any) amounting to less than full payment of their claims. All such misconduct is imputed as a matter of law to the entities for which Gould acted (see Paragraph 62(a) in the Conclusions of Law which follow).

P. *Valuation of the Project*

49. Prior to confirmation, no party or attorney for a party requested a valuation hearing. The Court had before it the following evidence as to the value of the Miami Center Project:

(a) the debtors' appraisal [C.P. No. 392], setting the value of the Project at \$260.5 million (land and buildings) plus \$14.5 million (FF&E) as of October 1, 1984;

(b) the Hadid contract [Exhibit "A" to C.P. No. 378] of February 11, 1985, for a gross purchase price of \$260 million, apparently exclusive of the FF&E;

(c) the liquidation values assigned to the property by the debtors in their disclosure statements: \$210 million for the structures [Exhibit "E" to C.P. No. 378] and \$23.4 million for the underlying land [Exhibit "E" to C.P. No. 380], or a total of \$233.4 million without the FF&E; and

(d) the Bank's appraisal [C.P. No. 479, 796], setting the value of the Project including the FF&E at \$255.6 million as of November 15, 1984.

50. Upon remand, the parties presented the testimony of their respective appraisers. Each appraiser adhered to his prior estimate of value [transcript of hearing of January 18, 1986 (not yet docketed), pages 62-108].

51. Upon the record before the Court prior to confirmation, the Court found that the Bank's proposed purchase price of \$255.6 million, including the FF&E, was fair and equitable, and considerably in excess of the liquidation value of the Project as computed by the debtors. The Bank's offer was the only firm offer available, and had the added benefit of releasing over \$30 million of the Bank's cash collateral for the payment of other creditors. In the Confirmation Order of August 8, 1985, this Court noted:

The debtor's major contention has been that the assets are worth substantially more than the bank has offered to pay. The only way to be certain with respect to this issue is to delay liquidation as long as Gould requests. If I did so and if he produced no more tangible results during the next year than he did in the past year, virtually every creditor except the bank would be wiped out and the substantial loss now faced by the bank would become a blood bath. To me, the decision appears clear.

The absence of offers in excess of the Bank's proposal is significant. The Bank's purchase price and MAI appraisal (\$255.6 million, including FF&E) are between

the debtors' liquidation estimate (\$233.4 million, without FF&E) and the debtors' MAI appraisal (\$260.5 million without FF&E, or \$275 million with FF&E). The two appraisers agree that the income approach to value should be given the greatest weight. The debtors' appraisal computed a value of \$267 million under that approach [C.P. No. 392, page 99], while the Bank's appraiser's comparable estimate was \$255.6 million. The difference between the values, less than 5%, apparently occurred because the debtors used estimated taxes and assessments of \$4 million per year, while the Bank's appraiser used the actual taxes and assessments imposed by Dade County and the City of Miami (approximately \$5.2 million per year) [transcript of hearing of January 18, 1986 (not yet docketed), page 91].

52. The Court has not been presented with any new evidence upon remand that would alter the findings in the Confirmation Order. The evidence upon remand does, however, make it clear that the debtors are taking inconsistent positions for purposes of these proceedings on the one hand and Dade County property tax proceedings on the other. The County appraised the facilities at \$183.7 million in 1984, while the debtors' "good faith estimate" of value for the Project was only \$87 million [see Exhibit "A" to C.P. No. 491, "Debtors' Emergency Motion for Authorization to Pay Good Faith Deposit on 1984 Dade County, Florida Real Estate Taxes", also marked as Exhibit "D" at the hearing of January 18, 1985].

53. Based upon all of the foregoing, the Court finds that the \$255.6 million purchase price offered by the Bank for the Project (including the FF&E) is fair and equitable, and is in the best interest of the creditors. The Court further finds that the Bank is a good faith purchaser.

Q. *District Court Action*

54. In the Confirmation Order, the Court noted the litigiousness of the parties:

If this court had permitted the attorneys to do so, the charges, countercharges, law suits, briefs and oral arguments with respect to these issues would almost certainly continue until the last available penny had been spent to pay counsel. If the creditors are to salvage anything from these cases, they must be resolved as rapidly as the law permits in order that the assets may be liquidated and the continuing losses may be ended.

The District Court Action is an illustration of that point. In the memorandum decision respecting the releases signed by each of the debtors [C.P. No. 20 in Adv.Pro. 85-0160], this Court held that the releases barred both future and existing claims relating to the transactions between the debtors and the Bank. Notwithstanding the releases and this Court's ruling on the releases, however, the debtors continued to maintain the District Court Action.

55. It is not surprising that the Bank required dismissal of the District Court Action as a condition to close the purchase under its Plan. It would make little sense for the Bank to invest new money, discharge its judgment lien, and release millions of dollars of cash collateral, only to remain exposed to continuing litigation costs (probably unrecoverable from the debtors). In light of the releases, no significant value can be assigned to the District Court Action; to the contrary, the continuance of the suit is a significant detriment because of the first-priority attorneys' fees that would have to be incurred to do so.

56. This analysis was confirmed upon remand by the expert testimony of a seasoned, local trial lawyer (and former Florida Circuit Court Judge), presented by the

Bank upon remand [transcript of hearing of January 18, 1986 (not yet docketed), pages 34-39]. I find that the District Court Action has no significant value to the debtors.

R. *Consummation of the Bank's Plan*

57. The Court has now also had the unusual opportunity to observe the substantial consummation of the plan under evaluation (after the debtors failed to post the appeal bond upon which a stay was conditioned). The fairness, feasibility, and propriety of the plan have been verified by the following, and propriety of the plan have been verified by the following, as reported by the parties and the Liquidating Trustee:

(a) all Class 1 administrative claims have been paid or reserved for;

(b) the Project was sold on October 10, 1985, resulting in the satisfaction in full of the claim of the Class 2 creditor (the Bank) and the termination of interest (accruing at over \$2 million per month) and negative cash flow from operations;

(c) the Class 3 creditor has been paid in full;

(d) Undisputed claims in Classes 4 through 6 have been paid in full, and funds have been reserved for all disputed claims;

(e) several disputed claims have been compromised, saving the estates millions of dollars as against the amount claimed; and

(f) there remain sufficient funds for the satisfaction in full or in part of the claims of the Gould-affiliated claimants (although the exact amount cannot yet be determined because so many of the claims are unliquidated).

No stay is in effect, and the confirmed plan has been consummated. The debtors' property passed to the Liqui-

dating Trustee, and the debtors were discharged under Code Section 1141. It is now legally and practically impossible to unwind the consummation of the Bank's plan or otherwise to restore the status quo before confirmation.

Conclusions of Law

S. Substantive Consolidation

58. Substantive consolidation, derived from this Court's general equitable powers under 11 U.S.C. § 105, is a case-by-case inquiry. 5 *Collier on Bankruptcy*, ¶ 1100.06 at 1100-33 (15th ed.). In substantive consolidation cases, "the relationship between entities with respect to which consolidation is sought is far more important than the nature of such entities". *Id.* Thus it is not significant that the debtors sought to be consolidated are an individual, two partnerships, and two corporations.

59. Certain objective criteria should be considered in evaluating whether substantive consolidation is warranted:

(a) The presence or absence of consolidated financial statements;

(b) The unity of interests and ownership between various corporate entities;

(c) The existence of parent and intercorporate guarantees on loans;

(d) The degree of difficulty in segregating and ascertaining individual assets and liabilities;

(e) The existence of transfers of assets without formal observance of corporate formalities;

(f) The commingling of assets and business function; and

(g) The profitability of consolidation at a single physical location.

In Re Donut Queen, Ltd., 41 B.R. 706, 709 (Bkcty., E.D.N.Y. 1984).

60. However, "there is no one set of elements which, if established, will mandate consolidation in every instance." *In re Snider Bros., Inc.*, 18 B.R. 230, 234 (Bkcty., D. Mass. 1982). Instead, "the enumerated factors should be evaluated within the larger context of balancing the prejudice resulting from the proposed order of consolidation with the prejudice the moving creditor alleges it suffers from debtor separateness". *In re Donut Queen, supra*, at 709-10.

61. The Court also may approve substantive consolidation when the expense and difficulty of determining intercompany claims, liabilities, and ownership of assets is substantial. *Chemical Bank New York Trust Co. v. Kheel*, 369 F.2d 845, 847 (2d. Cir. 1966); *In re Nite Lite Inns*, 17 B.R. 367, 371 (Bkcty. S.D. Cal. 1982).

62. On the facts established here (Paragraphs 29 through 41, above), substantive consolidation is appropriate. Because of controlling provisions of Florida law relating to creditors' rights, substantive consolidation under the Bank's plan here does little more than to adopt and implement state law. For example:

(a) In due course, a creditor of MCLP could reach (i) Gould's assets (because of his liability as a general partner), (ii) MCC's assets (because of MCC's role as a general partner), (iii) Holywell's assets (net of its liabilities), by levying upon Gould's ownership of 100% of the stock of Holywell, and (iv) Chopin's assets (net of its liabilities), since it is owned 36% by Gould and 64% by MCC. The pertinent provisions of Florida's partnership laws are:

(1) *620.62 Partnership bound by partner's wrongful act.* When loss or injury is caused to a partner in the partnership . . . the partnership is liable for it to the same extent as the partner so acting or omitting to act.

(2) *620.625 Partnership bound by partner's breach of trust.* The partnership is bound to make good the loss:

(i) When one partner acting within the scope of his apparent authority receives money or property of a third person and misapplies it; and

(ii) When the partnership in the course of its business receives money or property of a third person and the money or property so received is misapplied by a partner while it is in the custody of the partnership.

(3) *620.63 Nature of partner's liability.* All partners are liable:

(i) Jointly and severally for everything chargeable to the partnership under §§ 620.62 and 620.625.

(b) The foregoing statutes, which extend to breaches of contract by Gould, also make MCLP and Chopin responsible for any liabilities of Gould incurred in connection with the Miami Center Project.

(c) Similarly, a creditor of Holywell ultimately could reach (i) MCC's assets (net of its liabilities), because MCC is 100% owned by Holywell, (ii) MCC's ownership, in turn, of 47.88% of MCLP and 64% of Chopin, (iii) Gould to the extent he acted as director or president of Holywell to misapply Holywell's funds (see Paragraph 37, above), and (iv) MCLP because of Holywell's alleged ownership of a claim for over \$4 million against MCLP (see Paragraph 35(a), above).

(d) Finally, creditors of MCC and Chopin eventually could reach those debtors' partnership interests in MCLP

and therefore the net assets of MCLP itself (under Sections 620.62 and 620.625, Florida Statutes, *supra*), and a creditor of Chopin could reach the assets of both MCC and Gould (because each is a general partner of Chopin).

63. The Court found [C.P. No. 844, page 97], that the alternative to substantive consolidation, "would appear to be an unnecessarily circuitous, time-consuming, and expensive exercise that might conceivably lead to the diversion of some assets which, under the principles of law as I understand them, ought to be available for the satisfaction of these obligations". In short, if the creditors of the five separate estates seek to assert their claims against the primary obligors, the other estates which have contingent or secondary liability under Florida law for those claims may be closed (and any residue diverted or misapplied) before the primarily liable estate is exhausted. Substantive consolidation avoids the unfairness inherent in such a result.

64. Analyzing the seven factors enumerated in *In re Donut Queen*, *supra*, the Court concludes that:

(a) Consolidated financial statements were prepared as to Holywell, MCC, and MCC's interests in Chopin and MCLP (see Paragraphs 32 and 39, *supra*). In addition, even the debtors' bi-weekly debtor-in-possession reports were prepared on a consolidated basis during the period before confirmation [see, for example, C.P. No. 423].

(b) There is a single common element of interest, control, and ownership of all five debtors: Theodore B. Gould.

(c) The debtors' schedules reflect numerous cross-guaranties of loans and other obligations of the debtors. In particular, all five debtors guaranteed all of the Bank's advances to MCLP and to Chopin (totalling over \$240 million in principal and interest).

(d) The inter-company debts, in excess of \$31.8 million, would require substantial accounting and legal expenditures to investigate and adjust. The costs of such an investigation would delay payments to unaffiliated creditors and would reduce the amount available to pay creditors. In light of the joint and several liability of several of the debtors under Florida law, such expenditures are not warranted.

(e) Gould operated the debtors without regard to their separate identities. He caused Holywell, for example, to advance \$1.75 million to him without the formality of even a promissory note (see Paragraph 37, *supra*). He testified to numerous pre-petition transfers among the debtors and their affiliates [C.P. No. 385h, page 202].

(f) Business functions and assets were commingled. Certain debtors regularly paid obligations and performed services for other debtors and their affiliates, instead of letting the beneficiary pay or perform directly [C.P. No. 385h, pages 45, 55, 67-69, 141].

(g) The debtors can operate (and are operating) successfully at a single location. Having announced an intention to leave Miami, the debtors' single office is now in Charlottesville, Virginia [C.P. No. 844, page 50].

65. Each of the seven factors supports substantive consolidation in this case. Moreover, there is no prejudice to the creditors. The creditors did not object to substantive consolidation, and the Creditors' Committees supported that aspect of the Bank's plan.

66. The debtors have claimed prejudice, but have not proven it. At the hearing on July 18, 1985 [C.P. No. 844, page 68], the debtors indicated no objection to consolidation except in the case of Holywell's consolidation with MCLP:

[The Court]: . . . if the—well, let me ask a preliminary question—the nub here, the serious problem

and the only serious problem, I take it, that the debtor has with consolidation is the attempted consolidation of Holywell and MCLP?

[Debtors' Counsel]: That's correct, and Holywell is the one objecting.

The debtors never demonstrated prejudice as an unavoidable consequence of substantive consolidation. There has been no evidence to substantiate the debtors' claim that substantive consolidation will somehow cost them "approximately \$17 million in Federal income taxes" [C.P. No. 580, page 2].

67. Based upon all of these factors and the authorities previously cited, and in the exercise of its equitable powers under Code Section 105(a), the Court finds that substantive consolidation in the minimal form proposed by the Bank is equitable, is in the best interest of the creditors, and (because of the substantial unity of ownership interests in all five debtors in Gould) does not unfairly prejudice the debtors. As provided by the Bank's plan, each debtor will retain its individual name, form of organization, and the right to continue business, after discharge. The debtors will not disappear in a merger-like consolidation as is sometimes sought in such cases. The Bank's plan does require that each debtor's assets be exposed to the claims of creditors of all of the related estates, however, so the Bank has labelled that aspect of its plan as "substantive consolidation." The Court finds that the Bank has accepted and satisfied its burden under applicable precedent. The Court does not believe that the hundreds of creditors involved here should be required to engage in a shell game or to have to guess which debtor is most likely to be able to pay. Many of the creditors are not represented by counsel and apparently are not even aware that they have claims against several of the estates under Florida law, rather than just the single estate of the primary obligor. The need for credi-

tors to file such claims and to trace assets is completely attributable to the labyrinth that Gould has created. Consolidation here will not make any debtor pay any creditor unless that debtor or one of its secondarily-liable co-debtors (principally Gould) was legally responsible for the claim involved.

T. *Classification*

68. Section 1122(a) of the Code directs that, with a single exception not applicable here, "a plan may place a claim or interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class."

69. The creditors that have objected to a junior classification hold claims that are markedly dissimilar, both as to the ultimate effect of payment of the claim and as to the special property held by the claimant (see Paragraphs 42 through 45 above). In the case of MCJV:

(a) Payment of MCJV's claim will benefit debtor Gould's 50% equity interest in MCJV by 50% of the payment. MCJV's claim is in essence a hybrid of debt (to the extent that O&Y, a non-debtor is benefitted) and equity (to the extent that a debtor, Gould, is benefitted).

(b) MCJV's claim can readily be satisfied from special property (the four downtown lots, appraised at \$104 million) held by MCJV and not directly available to satisfy the claims of creditors that are not affiliated with Gould. MCJV's claim can be satisfied by merely reducing Gould's equity interest in, and other claims against, MCJV. Under the equitable principle of marshalling, MCJV may be required to look first to a source of recovery unavailable to other competing creditors. *In re All American Holding Corp.*, 10 B.R. 71, 73 (Bkcty. S.D. Fla. 1981), *aff'd* 17 B.R. 926, 928-29 (S.D. Fla. 1982). *Matter of Emerald Hills Country Club*, 32 B.R. 408, 421-22 (Bkcty. S.D. Fla. 1983).

70. In the case of HTC and HLC, both are wholly-owned subsidiaries of a debtor and are completely controlled by Gould. It would be inequitable to permit such claimants to share ratably with unaffiliated unsecured creditors. To do so here would be to violate the absolute priority rule by permitting a debtor and its equity interests to share equally and in parity with an unsecured creditor. In view of Gould's undisputed control of these claimants, they were properly classified below the general unsecured creditors.

71. In the case of O&Y, the marshalling analysis set forth above is also applicable. As the only other general partner of MCJV, O&Y has access to a special source of recovery (Gould's ownership interest in MCJV) that is unavailable to other creditors. Additionally, any payment to O&Y reduces O&Y's parallel claim against MCJV in the remanded arbitration proceedings now pending between O&Y and Gould, thereby increasing Gould's 50% equity interest. By reducing the aggregate liabilities of MCJV, any such payment benefits Gould by an amount equal to 50% of the payment. That is not the case with respect to payments made by the debtors to unaffiliated creditors. The Court also notes that the debtors' plans [C.P. No. 466-70] classified O&Y separately, based upon the fact that O&Y has recourse to the MCJV property. The debtors' plans contemplated that O&Y would not be paid until (a) the arbitration and litigation between O&Y and Gould reached an end and (b) MCJV sold a substantial part of its real estate.

72 Each of these objecting affiliated creditors is an "insider" under 11 U.S.C. § 101(28) (A) (subparagraph (ii), as to MCJV; subparagraph (iii), as to O&Y; and subparagraph (iv) as to HTC and HLC). On facts similar to those here it has been held that an insider may not, "share the same priority with general unsecured creditors of the Debtor". *In re Economy Cast Stone Co.*, 16 B.R. 647, 651 (Bkcty. E.D. Va. 1981); *In re Toy &*

Sports Warehouse, 37 B.R. 141 at 152 (Bkctcy. S.D.N.Y. 1984)

73. The debtors' proposed plans also accorded a junior priority to the claims of "affiliated Creditors", defined to include entities "in which the Debtor owns an equity interest", thereby assigning a junior classification to the claims of MCJV, HTC, and HLC [C.P. No. 466-470, Exhibit "A", pages 1-2].

74. The unaffiliated creditors would not likely have accepted a plan which gave higher or equal dignity to the claims of Gould-controlled equities. The claims of the Gould-controlled entities are not "substantially similar", either legally or in practical effect, to the claims of the unaffiliated creditors assigned separate and senior classes by the Bank's plan. Accordingly, the Bank's classification structure complies with 11 U.S.C. § 1122(a).

U. *Equitable Subordination*

75. Based upon the Court's findings with respect to Gould's conduct (Paragraphs 46-48), the Court concludes that equitable subordination under Sections 510(c) of the Code and the tripartite test of *Mobile Steel Co.*, 563 F.2d 692, 700 (5th Cir. 1977), is warranted. The claims of MCJV, O&Y, HTC, and HLC warrant equitable subordination because Gould's misconduct, and the attendant prejudice to other creditors, is imputed to those claimants as a matter of Florida partnership law and the law of agency. MCJV and O&Y themselves alleged such misconduct in their objections to the debtors' plans (Paragraph 9(a)(2), 9(a)(7), above). On the record here, Gould will not be permitted by this Court to receive distributions before, or even on a parity with, the unsecured creditors.

V. *District Court Action*

76. The Court has performed the "cost/benefit" analysis of the District Court Action, as suggested by the

debtors. *Matter of Jackson Brewing Co.*, 624 F.2d 599 (5th Cir. 1980); *TMT Trailer Ferry v. Anderson*, 390 U.S. 414, 20 L.Ed. 2d 1, 88 S. Ct. 1157 (1968).

77. The Court concludes (see Paragraphs 54-56) that the claims asserted in the District Court Action are barred (a) by the releases executed by the debtors and (b) by this Court's memorandum decision [C.P. No. 20 in Adv. Pro. 85-6160], which bars re-litigation of the release issue. *Southmark Properties v. Charles House Corp.*, 742 F.2d 862, 869 (5th Cir. 1984). Based upon that conclusion and the testimony of the only expert witness to address the matter, the District Court Action is not worth the cost of prosecution.

78. The Bank's plan and the Liquidating Trustee may lawfully dismiss the District Court Action. The District Court Action is an asset of the debtors' estates subject to the jurisdiction of this Court. 11 U.S.C. § 541(a)(1); *In re AutoWest, Inc.*, 43 B.R. 761, 763 (D. Utah 1984). The Bank's plan provided that ownership of the District Court Action passed to the Liquidating Trustee, who thereby acquired the power to pursue, abandon, or compromise the claims. 11 U.S.C. § 1141(c). This Court has not in any way encroached upon the jurisdiction of the District Court. Ownership of the District Court Action passed to the Liquidating Trustee when the debtors failed to stay consummation, and the Liquidating Trustee has stipulated to dismissal of the lawsuit. In doing so, the Liquidating Trustee was performing a condition precedent to the realization of significant benefits for the estates—the closing of the sale of the Project, the resultant infusion of millions of dollars of new cash, and the release of over \$30 million of the Bank's cash collateral.

W. Confirmation Requirements

79. The parties' certificates on the voting [C.P. No. 658-64] were verified by the Clerk's office.

80. The debtors' plans failed to receive acceptance under 11 U.S.C. § 1126(c). I also conclude that the debtors' plans were not feasible because of the delays and contingencies inherent in both the Hadid contract and the attempt to subordinate the Bank's \$240 million claim. Finally, the debtors' plans cannot be confirmed because of the Court's finding (Paragraph 28) that consummation likely would have been followed by liquidation or the need for further financial reorganization. 11 U.S.C. § 1129(a)(11).

81. The stipulations [C.P. No. 564, 614, 709c, and 876a] and second amendment [C.P. No. 854] did not adversely affect any party other than the Bank, and therefore did not require a supplemental disclosure statement or hearing for purposes of Code Section 1127. The Bank's plan as so amended was accepted by the requisite number of creditors in Classes 1 through 6. (Paragraph 15; 11 U.S.C. § 1126(c)). The Gould-affiliated Classes (7 through 9) rejected the Bank's plan.

82. The Bank's plan does not discriminate unfairly, and is fair and equitable with respect to each of the three classes that did not accept it. The Bank's plan complies with Sections 1129(a) and (b) of the Code:

(a) The Bank's plan complies with the applicable provisions of Chapter 11 of the Code.

(b) The Bank, as proponent of its plan, has also complied with applicable provisions of Chapter 11.

(c) The Bank's plan has been proposed by the Bank in good faith, and not by any means forbidden by law.

(d) Any payments made or promised by the Bank for services or for costs and expenses in, or in connection with, the case, or in connection with the plan and incident to the case, have been disclosed to the Court; there are no such payments to be made before confirmation; and each such payment to be fixed after confirmation is subject to the approval of this Court as reasonable.

(e) The Bank has disclosed the identity and affiliations of the Liquidating Trustee, and the Trustee's appointment and continuance in office are consistent with the interests of the creditors and equity interest holders, and with public policy. Section 1142 of the Code specifically contemplates the possibility that a liquidating trust and trustee may be the entities designated by a plan to carry out the plan after confirmation. Further, the Bank has disclosed the identity of any insider that will be employed by or retained by the reorganized debtors, and the nature of any compensation for such insider.

(f) There are no regulatory commissions with jurisdiction (for purposes of Section 1129(a)(6)).

(g) With respect to each impaired class of claims or interests, (1) each holder of a claim or interest of such class has (A) accepted the Bank's plan or (B) will receive or retain under the plan on account of such claim or interest property of a value, as of the "Effective Date", that is not less than the amount such holder would receive or retain in liquidation, or (2) if Code Section 1111(b)(2) applies to the claims of such class, each such holder will receive or retain on account of such claim property of a value, as of the Effective Date, that is not less than the value of such holder's interest in the estate's interest in the property that secures such claims. Under the Bank's plan, all mechanics' lienors are paid in full, so the debtors' objections regarding the priority of such liens are moot.

(h) Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the Bank's plan provides that: (1) with respect to a claim of a kind specified in Sections 507(a)(1) or 507(a)(2) of the Code, on the Effective Date, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim; (2) with respect to a class of claims of a kind specified in Sections

507(a) (3), 507(a) (4), or 507(a) (5) of the Code, each holder of a claim of such class will receive, if such class has accepted the Bank's plan, deferred cash payments of a value, as of the Effective Date, equal to the allowed amount of such claim (or, if such class has not accepted the plan, cash on the Effective Date equal to the allowed amount of such claim); and (3) with respect to a claim of a kind specified in Section 507(a) (6) of the Code, the holder of such claim will receive on account of such claim deferred cash payments, over a period not exceeding 6 years after the date of assessment of such claim, of a value, as of the Effective Date, equal to the allowed amount of such claim.

(i) At least one class of claims has accepted the Bank's plan, determined without including any acceptance of the plan by an insider holding a claim of such class.

(j) Confirmation of the Bank's plan is not likely to be followed by the liquidation, or the need for further financial reorganization, or the debtors or any successors to the debtors under the Bank's plan, except to the extent that liquidation or reorganization is proposed by the plan.

(k) With respect to the impaired classes and creditors that rejected the Bank's plan (MCJV, O&Y, the debtors, and the debtors' affiliates) and the requirement of Code Sections 1129(a) (8) and 1129(b), the Bank's plan does not discriminate unfairly and is fair and equitable with respect to each such impaired class of claims:

(1) Each holder of an impaired secured claim has retained the lien securing such claim, to the extent of the allowed amount of such claim, and will receive on account of the claim deferred cash payments totalling at least the allowed amount of the claim and of a value, as of the Effective Date, of at least the value of such holder's interest in the debtors' interest in such property.

(2) (A) Each holder of an impaired unsecured claim has received or retained on account of such claim property of a value, as of the Effective Date, equal to the allowed amount of such claim, or (B) the holder of any claim or interest junior to the claims of such impaired, unsecured class will not receive or retain any property on account of that junior claim or interest.

(3) (A) Each holder of an interest will receive or retain on account of such interest property of a value, as of the Effective Date, equal to the value of such interest (no such holder is entitled to a fixed liquidation preference or fixed redemption price, so far as the record reflects), or (B) the holder of any interest junior to the interests of such class will not receive or retain any property on account of that junior interest. The priority of distribution to Holywell creditors pursuant to stipulation does not adversely affect any equally-situated creditors, since all creditors through Class 6 will be paid in full. Accordingly, the Bank's plan was and is entitled to confirmation.

In accordance with the Order of Remand, the foregoing findings of fact and conclusions of law are hereby incorporated within, and made a part of, the Confirmation Order, *nunc pro tunc*.

DONE AND ORDERED at Miami, Florida, this 29th day of January, 1986.

/s/ Thomas C. Britton
THOMAS C. BRITTON
Bankruptcy Judge

Copies to:

See attached service list.

APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 85-3225-Civ-Aronovitz

Bk. Nos: 85-01590-BKC-TCB
85-01591-BKC-TCB
85-01592-BKC-TCB
85-01593-BKC-TCB
85-01594-BKC-TCB

HOLYWELL CORPORATION,
MIAMI CENTER LIMITED PARTNERSHIP,
MIAMI CENTER CORPORATION,
CHOPIN ASSOCIATES,
THEODORE B. GOULD,
Appellants/ (Debtors),

vs.

BANK OF NEW YORK,
Appellee/ (Principal Creditor).

ORDER OF REMAND AND DENIAL OF
MOTION TO DISMISS

This is an appeal from Chapter 11 proceedings in the United States Bankruptcy Court for the Southern District of Florida. Appellants (five) Chapter 11 debtors in the proceeding below, appeal from two orders of the bankruptcy judge:

- a.) an order approving the substantive consolidation of the debtors' estates; and,
- b.) the trial court's order confirming the plan or reorganization proposed by the Bank of New York, the major creditor of the debtors' estates and the appellee herein.

Both rulings are intertwined and interdependent. Also before the Court are two motions filed by the appellee and by the liquidating trustee appointed under the confirmed plan which seek to dismiss this appeal on the grounds of mootness.

The five debtors who initiated the Chapter 11 proceedings below and those estates were consolidated by order of the Bankruptcy Judge, Thomas C. Britton are:

Miami Center Limited Partnership (hereinafter "MCLP"), which developed the Miami Center Project;

Chopin Associates, the owner of the land, leased to MCLP, upon which the facility was built;

Holywell Corporation, an entity involved in servicing and holding real property;

Miami Center Corporation, a subsidiary of Holywell Corporation; and

Theodore B. Gould, the sole shareholder of Holywell Corporation, president of the Miami Center Corporation, and a general partner of both Chopin Associates and the Miami Center Limited Partnership.

The Bank of New York, the appellee, was the primary secured creditor of the debtors, having advanced over Two Hundred Million (\$200,000,000) Dollars in mortgage loans for the purchase and construction of the Miami Center Project.

Involved in these proceedings, among other assets of the debtors and the claims of various other creditors, is property known as the Miami Center, situated at a bay-front site in downtown Miami, Florida (roughly South of Bayfront Park). The Miami Center, the debtors' major asset, consists of a modern 35-story hotel (The Pavillon) and office building structure (Edward Ball Building) with two towers joined by a restaurant and

shopping complex known as the Podium. The hotel and office facilities were furnished with furniture, fixtures and equipment (FF&E) which were leased from some affiliated creditors of the debtors. Construction and management of the Miami Center was the responsibility of MCLP. (Four additional vacant lots (blocks) adjacent to the debtors' property are owned by the Miami Center Joint Venture, which is not a debtor in these proceedings. Thus, these four blocks were not included in the debtors' estates for purposes of reorganization.)

HISTORY OF THE CHAPTER 11 PROCEEDINGS

Due to substantial disagreements among the five debtors and the Bank of New York over the priority to be given to the latter's mortgage loans vis-a-vis subsequent financing arrangements made by the debtors, the Bank declared its mortgage loans secured by the Miami Center property to be in default in early 1984, and filed foreclosure proceeding against the property on July 27, 1984. All five debtors thereupon filed petitions under Chapter 11 of the Bankruptcy Code in the court below. Between the initial filing of those petitions on August 22, 1984 and the issuance of the court's final order of confirmation on August 8, 1985, Judge Britton considered and ruled upon a myriad of motions and other matters, as can be seen by the voluminous record before this Court on appeal. Appellants here challenge the bankruptcy court's rulings on two of the most significant of these rulings:

1. The July 23, 1985 Order Approving the Substantive Consolidation of the Debtors' Estates (Court Paper #840).¹

¹ Substantive consolidation, in the context of a Chapter 11 proceeding, entails much more than the mere procedural consolidation contemplated by *Fed.R.Bankr.P.* 1015. As the advisory committee note to that rule explains, the substantive combination of the estates of various debtors is only sometimes appropriate, depending upon the factual circumstances of the case. Substantive consolida-

2. The August 8, 1985 Final Order of Confirmation, confirming the plan of reorganization of the appellee Bank of New York (Court Paper #906).

The major components of the plan approved by the court below are as follows:

—The Bank would acquire the entire Miami Center Project Property, including the furniture, fixtures and equipment (FF&E) for the sum of Two Hundred Fifty-five Million, Six Hundred Thousand (\$255,600,000) Dollars. (This figure is based on a valuation of the property performed by Charles V. Failla & Associates and commissioned by the Bank of New York. Appellants contest the validity of this appraisal and the fact that the court below did not hold hearings thereon.) This acquisition would be funded through the net amount already owed to the appellee by the debtors—approximately Two Hundred Forty Million (~~\$240,000,000~~) Dollars—to which would be added Thirty Million (\$30,000,000) Dollars realized through the sale by debtors Holywell and Gould of certain unrelated, distinct real property in Washington, D.C. This latter sum of Thirty Million (\$30,000,000) Dollars has been held and maintained as additional collateral by the Bank in a separate collateral account. (See Judge Britton's Order of December 31, 1984. Court Paper #303.)

—The liquidating trustee, to be appointed under the Plan, would have effective control over the operations of the Miami Center, ousting the debtors in possession. In addition, the trustee would be required by the terms of the Plan to voluntarily dismiss the civil suit filed by the debtor/appellants in

tion has been defined as an equitable remedy in which "the assets or liability of different entitites are consolidated and dealt with as if the assets were held by, and the liabilities incurred by, a single entity." *Matter of Luth*, 28 B.R. 564, 566 (D. Idaho 1983), citing 5 Collier on Bankruptcy, p. 1100-32, (15th Ed. 1980).

this Court, Case No. 85-0228-Civ-Hoeveler, which sought damages against appellee for breaches of its loan agreements, violations of the federal RICO statute, and other actions.

—The Bank would set aside Fifteen Million (\$15,000,000) Dollars, backed by surety bonds, for two creditors who had leased the equipment and fixtures to the MCLP. (The ruling is under separate appeal by the Bank of New York in this Court before the Honorable C. Clyde Atkins who required this sum in the nature of a Supersedeas Bond.)

—The claims of Miami Center Joint Venture, Holywell Telecommunications, and Holywell Leasing Company, affiliated creditors who had leased the FF&E to the Miami Center owners, would be equitably subordinated to those of other creditors with lower priority on the grounds these creditors were “insiders”.

—The Bank’s Plan further required the substantive consolidation of the estates of the five debtors/appellants. *See f.n.¹, supra.*

The substance of the two orders appealed from by the debtors is discussed below. (In actuality the Order approving Plan of Reorganization includes inferentially the effect of the Order of Substantive Consolidation.) Attached to this opinion for reference is a copy of each of these Orders, as well as an excerpt from the transcript of the hearing on substantive consolidation held before Judge Britton on July 18, 1985, which can be deemed to supplement the judge’s two-page Order on Substantive Consolidation entered on July 23, 1985.

THE SCOPE OF REVIEW AND NECESSITY OF ADEQUATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

It is settled beyond dispute that a district court, in deciding an appeal from a bankruptcy court's ruling, must accord substantial deference to the trial court's findings of fact, reversing these only when they are "clearly erroneous". *Matter of Missionary Baptist Foundation of America*, 712 F.2d 206, 209 (5th Cir. 1983). Conclusions of law, however, are subject to plenary review by the district court. *Matter of Multiponics*, 622 F.2d 709, 713 (5th Cir. 1980). There is authority holding that, where the bankruptcy court's findings are inadequate (or altogether absent) for purposes of review, then the "clearly erroneous" standard can be discarded, leaving the trial court's entire determination of the case freely reviewable. *Watson v. Thompson*, 456 F.Supp. 432, 436 (S.D. Ga. 1978).

The requirement that a trial court, acting without a jury, make explicit findings of fact and conclusions of law serves several purposes. Not only does it aid the appellate court in clearly understanding the proceeding below and the basis for the trial court's ruling, but it ensures that trial courts engage in a carefully reasoned analysis of each case. *Golf City, Inc. v. Wilson Sporting Goods Co., Inc.*, 555 F.2d 426, 432 (5th Cir. 1977). The requirement that trial courts enter findings of fact and conclusions of law in appropriate cases has long been a part of the Federal Rules of Civil Procedure. See Fed. R. Civ. P. 52(a). Rule 52 is made applicable to certain proceedings in bankruptcy by *Fed.R.Bankr.P.* 7052,²

² Rule 7052 has not been affected by the Bankruptcy Amendments and Federal Judgeship Act of 1984, P.L. 98-353 (July 10, 1984), and is widely cited by courts in their most recent decisions in the bankruptcy area. *Briden v. Foley*, 776 F.2d 379 (1st Cir. 1985); *In Re Fossum*, 764 F.2d 520 (8th Cir. 1985); *Judson v. Levine*, 50 B.R. 587 (S.D. Fla. 1985).

which requires the bankruptcy court to enter findings of fact and conclusions of law in adversary proceedings. Hearings on substantive consolidation and confirmation at issue here were *adversary* proceedings as that term is defined in *Fed.R.Bankr.P.* 7001. These hearings below were "contested" matters as hereinafter defined. Also, under general procedural and/or substantive provisions applicable wherein the trial court is sitting in equity to review rulings by a bankruptcy judge in matters founded in equity, findings of fact and conclusions of law are required. The requirements of *Fed.R.Civ.P.* 52(a) are nonetheless applicable to the instant appeal.

Fed.R.Bankr.P. 9014 extends the application of Rule 7052 to "contested matters" and encompasses, (*See* Advisory Notes to Rule 9014), the debtors' objections to the trial court's order on substantive consolidation. The appellants' objection to the final order of confirmation is explicitly made subject to Rule 9014 by *Fed.R.Bankr.P.* 3020(b). Thus, the Bankruptcy Judge should have made and entered clear and concise findings of fact and conclusions of law to support the orders from which this appeal is taken. This was not done. Such findings and conclusions as exist are inadequate for purposes of review. Actually, findings and conclusions are almost nonexistent or absent, and to such extent that in this case this Court does not consider that review by discarding the "clearly erroneous" standard and proceeding "*de novo*" should be undertaken.

THE GROUNDS OF THE DEBTORS' APPEAL

In their appeal to this Court, the appellants state the following substantive grounds for their appeal:

- 1.) that the equitable subordination of the claims of creditors Miami Center Joint Venture, Holywell Leasing Co. and Holywell Telecommunications Co. was error, both substantively (since their leases were determined to be "true leases",

thus meriting their treatment as outside creditors) and procedurally—(since no hearing was held on the subject of equitable subordination).

- 2.) that the substantive consolidation of the estates of the five debtors was error, in that the Bank of New York failed to carry its burden of proving the necessity of such consolidation and because two of the five debtors were solvent at the time of the bankruptcy court's order.
- 3.) that the bankruptcy court's failure to hold a hearing on the validity of the valuation of the Miami Center project which the Bank of New York submitted was reversible error.
- 4.) that the bankruptcy court's action in upholding that portion of Bank's plan which directs the liquidating trustee to dismiss the debtors' pending civil suit against the appellee is unconstitutional in that it allows a non-Article III court to remove a case from the jurisdiction of this court.
- 5.) that the Bank's plan, as confirmed by the bankruptcy court, unfairly discriminates against certain equally situated unsecured creditors by favoring one (i.e. Holywell Corporation) in violation of 11 U.S.C. 1129 (b).
- 6.) that the approved plan wrongly subordinates the claims of certain mechanics and materialmen.
- 7.) that the bankruptcy court denied the debtors due process by refusing their requests for hearings on various amendments to the Bank's proposed plan of reorganization and for adequate disclosure by the Bank of such amendments.

As to each of these grounds, this Court has been left with the impeded, if not impossible, task of trying to apply a "clearly erroneous" standard of review to find-

ings of fact that are either non-existent or too vague to support adequate review. As the Fifth Circuit noted in *Echols v. Sullivan*, 521 F.2d 206 (5th Cir. 1975), "findings that are nothing more than broad general statements, stripped of underlying analysis or justification shedding some light on the reasoning employed, makes it impossible for [an appellate court] to give meaningful review to the judgment." *Id.* at 207. For example, in his order approving the substantive consolidation of the debtors' estates, the bankruptcy judge supported his ruling with the following statement: "The Court finds that the legal relationships among the debtors and the facts in this record support the substantive consolidation of the estates . . ." Order of July 23, 1985 (Court Paper # 840. (See Appendix A.)

In the bankruptcy court's order confirming the Bank of New York's Plan of Reorganization, the lack of explicit findings is even more disturbing. The Bank's plan is the centerpiece of the entire Chapter 11 proceeding below, affecting, as it does, significant rights and interests of creditors and debtors alike. The plan consists of many complex provisions, some of which form the basis of this appeal. Yet, in his five page order approving this complicated plan which would determine the disposition of over Three Hundred Million (\$300,000,000) Dollars in assets, the bankruptcy court provided no more explanation of its decision to approve the plan than a statement that the plan "meets each of the requirements specified in 11 U.S.C. § 1129(a) and (b)." Final Order of Confirmation, dated August 8, 1985 (Court Paper # 906). In view of the important substantive rights which are inevitably affected by the Bank's plan, much more detailed treatment of both the legal reasoning and the underlying facts supporting these order was required.

To support its order of substantive consolidation, for instance, the trial court would have had to find the existence of certain, widely accepted factors which justify

this extraordinary remedy which, if employed inappropriately, can result in unfair treatment of both debtors and creditors. *In re Flora Mir*, 432 F.2d 1060 (2nd Cir. 1970). Those factors are set out in *In Re Donut Queen*, 41 B.R. 706, 709 (S.D.N.Y. 1984) and include the following:

1. The presence or absence of consolidated financial statements.
2. The unity of interests and ownership between the various corporate entities.
3. The existence of parent and intercorporate guarantees on loans.
4. The degree of difficulty in segregating and ascertaining individual assets and liabilities.
5. The commingling of assets without formal observance of corporate formalities.
6. The commingling of assets and business functions.
7. The profitability of consolidation at a single physical location.

In the same manner, a bankruptcy court, before it can justly order the equitable subordination of otherwise prior claims must first find that the following three tests are satisfied:

1. The claimant must have engaged in some type of inequitable conduct.
2. The misconduct must have resulted in injury to the creditors of the bankrupt or conferred an unfair advantage on the claimant.
3. Equitable subordination of the claim must not be inconsistent with the provisions of the Bankruptcy Act.

Matter of Mobile Steel Co., 563 F.2d 692, 700 (5th Cir. 1977).

It is clear from the record on appeal that here the bankruptcy judge never made the findings of fact necessary to satisfy the requirements of the tests cited above for equitable subordination and substantive consolidation. The same lack of accessible findings prevents this court from adequately reviewing the remainder of the issues presented in this appeal. For this reason, this Court has no alternative but to remand the entire matter before it to the bankruptcy court. Faced with the same situation, (lack of adequate findings of fact on appeal from an order of equitable subordination), the Fifth Circuit Court in *Matter of Missionary Baptist Foundation of America, Inc.*, 712 F.2d 206 (5th Cir. 1983) remanded the matter to the bankruptcy court, explaining that "we cannot conclude, in the absence of explicit findings by the bankruptcy court on each element of the *Mobile* test, that the [appellee] has discharged his burden of proof thereunder." *Id.* at 212.

The Court fully acknowledged that a trial judge, in ruling on a matter governed by the requirements of *Fed. R.Civ.P.* 52, is not held to any formalistic style in preserving his findings, such as numbered paragraphs. All that is required is that the factual and legal basis of every significant ruling be stated in a clear and understandable manner which permits the reviewing court to fairly decide any appeal which may emanate from that ruling. The record before this Court in this instant appeal fails to meet this standard.

There also seems to be a paucity of facts emanating from evidentiary hearings upon which the rulings should be founded. It seems evident that whenever necessary, upon remand, the bankruptcy court should review and consider the advisability of holding additional evidentiary hearings. At the very least, the bankruptcy court should require each party to list, in writing, any further evidentiary hearings they deem to be necessary. The bank-

ruptcy judge can then review these requests to determine and then hold evidentiary hearings on any such requests

It is therefore

ORDERED AND ADJUDGED that this matter be, and the same is, hereby REMANDED to the United States Bankruptcy Court for the Southern District of Florida, to schedule and to hold such further adversarial hearings and to make and enter such findings of fact and conclusions of law as are necessary to provide this Court with an adequate basis to decide the instant appeal on the merits. This should all be accomplished WITHIN THIRTY (30) DAYS herefrom.

THE DEBTORS' APPEAL IS NOT SUBJECT TO
DISMISSAL FOR MOOTNESS

Earlier in this opinion, the Court examined the substantive elements of this appeal and the necessity of a remand to the bankruptcy court for the complete findings of fact and conclusions of law required by the applicable rules of procedure. The Court's discussion of those substantive issues makes it clear that the debtors' appeal is not a frivolous one and that, absent compelling cause, the interests of justice would best be served by allowing the appellants an opportunity to present their appeal from a fully developed record below.

The debtors made several efforts to obtain a stay of the bankruptcy's court's orders pending the outcome of this appeal. The bankruptcy court, in its order of September 27, 1985, agreed to grant such a stay on the condition that the debtors post a supersedeas bond in the amount of One Hundred Forty Million (\$140,000,000) Dollars. The debtors thereupon took an emergency appeal to this Court from the bankruptcy court's stay order. The appeal was heard by Chief Judge James Lawrence King, who affirmed the bankruptcy court's grant of a stay, but reduced the amount of the supersedeas bond required to

Fifty Million (\$50,000,000) Dollars to be posted on or before October 10, 1985. Appellants then took an appeal from the district court's order to the Eleventh Circuit Court of Appeals, which appeal was dismissed by that court for lack of jurisdiction on October 9, 1985. Upon the debtors' failure to post the required bond, the bankruptcy court's stay terminated on October 10, 1985.

The Bank of New York, appellee in this cause, has moved to dismiss the appeal of Holywell Corporation and the other appellants on the ground that their appeal has been rendered moot by the appellants' failure, after several attempts, to obtain a stay of the implementation of the confirmation order pending this appeal. (A similar motion has been filed by the liquidating trustee, who is not a party to this appeal.) The appellee bases its motion to dismiss upon the "mootness doctrine" first codified in former Bankruptcy Rule 805 and followed by a significant number of decisions by courts throughout the United States. Rule 805 states, in pertinent part:

Unless an order approving a sale of property or issuance of a certificate of indebtedness is stayed pending appeal, the sale to a good faith purchaser or the issuance of a certificate to a good faith holder shall not be affected by the reversal or modification of such order on appeal whether or not the purchaser or holder knows of the pendency of the appeal.

Fed.R.Bankr.P. 8005, which replaced Rule 805 in 1983, does not contain any reference to the mootness standard of the previous rule. While that standard is preserved in the current bankruptcy code at 11 U.S.C. § 363(m), this statute applies the mootness doctrine only to the sale of the debtor's property by the trustee or the debtor himself. Where, as here, the debtors' assets have been sold by the liquidating trustee, § 363(m) is not applicable.

In the absence of a controlling statutory standard, this court must look to the applicable case law for guidance,

as the Eleventh Circuit Court of Appeals did in *In Re Sewanee Land, Coal and Cattle Company*, 735 F.2d 1294, 1296 (11th Cir. 1984). A survey of recent decisions regarding bankruptcy appeals filed without procurement of a stay of the proceedings below shows that the "mootness doctrine" stated by former Rule 805 is still widely accepted by courts throughout the United States. See, e.g., *Algeran, Inc. v. Advance Ross Corp.*, 759 F.2d 1421 (9th Cir. 1985); *In re Sewanee Land, Coal and Cattle Co.*, *supra*; *In Re Bel Aire Associates*, 706 F.2d 301 (10th Cir. 1983); *Greylock Glen v. Community Savings Bank*, 656 F.2d 1 (1st Cir. 1981). In each of these cases, however, the trial court order from which an appeal was taken was one approving the sale of the debtor's property. Indeed, the text of former Rule 805, to which these decisions refer, is specifically directed to "an order approving a sale of property." Where a bankruptcy court's order concerns matters other than the sale of property, the mootness doctrine may not apply. Thus, in *In Re Berg*, 45 B.R. 899 (Bankr. App. 1984), the Bankruptcy Appellate Panel of the Ninth Circuit ruled that the mootness standard embodied in former Rule 805 did not apply to an appeal from an order quieting title in the debtor's property, even where such property had been sold by the trustees and the proceeds distributed.

In an earlier decision, the Court of Appeals for the Ninth Circuit held that where a debtor appeals from several orders of the bankruptcy court, some of which are orders approving the sale of property, the debtor may appeal those orders not involved with the sale even in the absence of a stay. *Matter of Combined Metals Reduction Co.*, 557 F.2d 179 (9th Cir. 1977). While the *Combined Metals* court considered appeals from ten separate orders of the bankruptcy court, Holywell Corporation and the other appellants before this Court appeal from only two orders issued by Judge Britton in the proceedings below: the July 23, 1985 Order Approving Substantive Con-

solidation, and the Final Confirmation Order entered on August 8, 1985.

The order regarding substantive consolidation is clearly not one approving a sale of property; rather, it requires that the estates of the five debtors be combined to facilitate payments to their creditors. Should this court rule, after remand of this matter, in favor of the appellants on their appeal from the consolidation order, it can grant meaningful relief to the appellants by reversing the order, and that portion of the confirmed plan of reorganization which incorporates this order. For these reasons, the debtors' appeal of the bankruptcy court's order approving substantive consolidation is not moot, and will be decided by this court on its merits upon receipt of the findings of fact and conclusions of law ordered from the bankruptcy court.

The greater part of the present appeal concerns the Final Order of Confirmation and specific aspects thereof: the equitable subordination of certain creditors' claims, the requirement that the liquidating trustee dismiss the appellants civil suit, the validity of the estate valuation upon which the plan is based, and alleged procedural deficiencies in the conduct of the confirmation proceedings. Of course, the heart of the confirmed plan is the sale, *by the liquidating trustee*, of the Miami Center property for a purchase price of Two Hundred Fifty-five Million, Six Hundred Thousand (\$255,600,000) Dollars. The appellee contends that Judge Britton's order confirming the Bank's Plan of Reorganization, and hence this sale, is shielded from appellate review by the "mootness doctrine" of Rule 805 and the applicable case law.

The touchstone of those decisions, and of all determinations that a given suit or appeal is moot, is not the presence or absence of a single factual element (e.g., a sale of property). Rather, the fundamental criterion for judging whether a case on appeal has become moot has consistently been whether the appellate court has been ren-

dered incapable of granting effective relief to a petitioner due to a change in the circumstances of the case. *Mills v. Green*, 159 U.S. 651, 16 S. Ct. 132 (1895).

In the appeal before this court, the parties have informed the court that certain transactions have already taken place in accordance with the confirmation order issued below. The Miami Center property has been transferred by the liquidating trustee to a designee of the appellee, and certain claimants in classes three through six of the reorganization plan have been paid. The appellants, however, have frequently stated their approval of the payments made to such third-party creditors, and their intention that such claimants be satisfied regardless of the dispute between themselves and the appellee. This appeal is primarily directed at recovering title to the Miami Center property held by the Bank's designee and obtaining review of the bankruptcy court's substantive rulings noted above.

A crucial determination to be made is whether, accepting various actions have been taken by the liquidating trustee in reliance on the bankruptcy court's confirmation order, can effective relief be granted to the appellants should this Court decide, after the appeal is reinstated post-remand, that their appeal has merit? In determining that it is capable of granting such relief, this court has considered each of the points raised by the present appeal.

Reversal of the bankruptcy court's ruling on the equitable subordination of Miami Center Joint Venture, Holywell Telecommunications, and Holywell Leasing, Inc., would likewise return these entities to their pre-confirmation status; here, this would result in the three creditors being given the higher priority for their claims accorded to "arm's length" creditors. Denial of the liquidating trustee's authority to dismiss the appellants' district court suit would simply allow the action to remain viable, and review of the alleged procedural flaws in the valuation and

other proceedings below would, at most, necessitate further hearings on those matters. Thus, the posture of this appeal, at least as it concerns the points of appeal discussed here, is by no means such that events have rendered meaningful review impossible.

Finally, and most significantly, should this court decide the substantive appeal before it in the appellants' favor, the sale of the Miami Center, and its equipment and fixtures, could be undone. The property was sold *not* to a disinterested, third-party purchaser, but to the appellee itself, through its designee, for a purchase price of Two Hundred Fifty-five Million, Six Hundred Thousand (\$255,600,000) Dollars. This purchase price was satisfied by the Bank by combining the debtors' outstanding mortgage obligations to the Bank with Thirty Million (\$30,000,000) Dollars in cash collateral which was derived through a sale, by the debtors, of certain Washington, D.C. property. Much of this latter cash fund has already been applied to pay the claims of certain secured creditors, which use the appellants have approved. Although the Miami Center is now held by the Bank's designee, it is still in the effective possession of the Bank which, as appellee in this matter, is under the jurisdiction of the court. Should this court decide, after reviewing the findings made by the court below on remand, that the entire plan of reorganization was erroneously approved, it could fairly order the transfer of the Miami Center property back to the debtors, on the condition that those funds taken from the Thirty Million (\$30,000,000) Dollars collateral for payment to creditors remain undisturbed or be applied in behalf of debtors. The Bank of New York would be returned to its position as chief secured creditor, and could either propose a different plan of reorganization before the bankruptcy court or pursue remedies available to it as mortgagee. The appellants would be returned to the status of debtors in possession of the property, and could likewise attempt to obtain creditor approval for an alternate plan while seeking a buyer for the Miami

Center which would be willing to pay what the debtors contend is the property's true value.

This Court may ultimately reject the appeal presented by the debtors and uphold the bankruptcy court's orders on substantive consolidation and confirmation of the Bank of New York's plan. Today's opinion merely constitutes the court's determination that the appeal is a viable one, and that the court, should it determine that the appellants' requested relief, or other suitable remedy, is appropriate, would be able to grant it. Before any determination of the merits of this appeal can be made, however, the court must await the result of its remand of this matter to the trial court for his provision of findings of fact and conclusions of law which will enable this court to make a fair and informed judgment of the merits of the appeal.

For the foregoing reasons, it is

ORDERED and ADJUDGED that the appellee's motion to dismiss be, and the same is, hereby DENIED.³

DONE and ORDERED in Chambers at Miami, Southern District of Florida, this 30 day of DECEMBER 1985.

/s/ Sidney M. Aronovitz
SIDNEY M. ARONOVITZ
United States District Judge

Copy furnished to:

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³ There are several other appeals now pending in the United States District Court from the bankruptcy judge's rulings. These are before other judges, including two before Senior United States District Judge C. Clyde Atkins, and another before United States District Judge William Hoeveler.

APPENDIX H

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Case. No. 84-01590-BKC-TCB
84-01591-BKC-TCB
84-01592-BKC-TCB
84-01593-BKC-ACB
84-01594-BKC-TCB

IN RE: HOLYWELL CORPORATION, *et al.*,
Debtor(s).

CONFIRMATION ORDER

These five chapter 11 debtors are owned, controlled and dominated by the individual debtor, Theodore B. Gould. On February 15, the debtors filed separate, but identical plans. Eleven days later, the Bank of New York, the major creditor whose claim is undersecured and hopelessly in default, filed an alternative plan. The competing plans were submitted simultaneously to the creditors for their separate acceptance or rejection and a joint confirmation hearing was held on April 29. Although conventional wisdom under the previous Act has been that creditors cannot be relied upon to understand and vote upon more than one plan at a time, the simultaneous submission of competing plans is clearly authorized. 11 U.S.C. § 1129(c); B. R. 3018(c). I am convinced that the risk of confusion was acceptable in this instance.

All parties are agreed that the debtors' assets, principally a major office building and luxury hotel in downtown Miami must be liquidated and the sooner the better. The bank's plan rests upon a firm commitment by the bank to purchase the property for \$255.6 million. The

debtors' plans are based upon a "contract" to sell the property to an individual, Hadid, for a substantially higher price. However, there is no binding commitment from Hadid, who in effect has an option for which he paid nothing. The debtors have been in this court for nearly a year and have, so far, been unable to produce a firm contract at any price.

The competing plans differ significantly in their respective classification and treatment of creditors.

Because of the continuing and rapid escalation of the debtors' debt, this case could not tolerate the delay which would be caused by a separate and consecutive consideration of these competing proposals. In retrospect, there has been no indication that the creditors were befuddled by the simultaneous submission of the alternative plans.

By an overwhelming margin, the creditors (measured by the dollar amount of their claims) have demonstrated a preference for the bank's plan. The percentage of creditors who voted to *reject* each plan with respect to each of the five debtors was as follows:

	Debtors' Plans	BONY Plan	
	97% Rejection	15%	Rejection
Holywell	97% Rejection	15%	Rejection
MCLP	80% "	10%	"
MC Corp.	99% "	10%	"
Chopin	99% "	0.1%	"
Gould	80% "	12%	"

Each of the creditors' committees have elected to support the bank's plan.

The substantial sums involved coupled with the simultaneous consideration of competing plans have resulted in spirited litigation between the two camps on a number of issues. The circumstances do not require and time simply does not permit a review and discussion of all these issues in this order. If this court had permitted the attorneys to do so, the charges, countercharges, law suits,

briefs and oral arguments with respect to these issues would almost certainly continue until the last available penny had been spent to pay counsel. If the creditors are to salvage anything from these cases, they must be resolved as rapidly as the law permits in order that the assets may be liquidated and the continuing losses may be ended.

The principal support for the debtors' plans and, therefore, the major attack on the bank's plan comes from Gould and Olympia & York Florida Equity Corp. O. & Y. leased virtually all the furniture, fixtures and equipment required for the two large buildings. It has never received any payment. The bank has contended that the leases were not "true leases" but instead were unperfected financing agreements. By a judgment entered in and adversary proceeding on July 17, 1985, I rejected the bank's contention and agreed with O. & Y. The bank has appealed that decision and has filed a Second Amendment to Plan (C. P. No. 854) by which it in effect guarantees payment in full of the O. & Y. claim of \$14.4 million, if the bank is unable to obtain a reversal of my decision.

The bank's plan subordinates the O. & Y. claim to the payment of all other unaffiliated creditors. By this order, I am approving that classification. O. & Y. will surely seek review. The bank's Second Amendment to its plan assures the funding necessary to pay the claim in the event my decision with respect to subordination is reversed.

The remaining issues between the bank, on the one hand, and O. & Y. and the debtor MCLP (of which O. & Y. is, with Gould, a joint general partner) do not merit further elaboration here.

The debtors' major contention has been that the assets are worth substantially more than the bank has offered to pay. The only way to be certain with respect to this

issue is to delay liquidation as long as Gould requests. If I did so and if he produced no more tangible results during the next year than he did in the past year, virtually every creditor except the bank would be wiped out and the substantial loss now faced by the bank would become a blood bath. To me, the decision appears clear.

Gould's other major criticism of the bank's plan is its provision for a modified form of substantive consolidation proposed by the plan and approved by me in an order entered on July 23. (C.P. No. 840). There is a pending application for rehearing and reconsideration of that order. No new points are raised and rehearing is denied. The issue was aired at great lengths and no purpose would be served by a repetition here of the analysis and comments made by the court, on the record at the end of that hearing.

Gould's remaining contentions do not, I think, require discussion.

During the confirmation process, the bank entered into a stipulation with a creditors' committee on April 29. (C. P. No. 614). There was an addendum to that stipulation on the same day. (C. P. No. 564). A second addendum was agreed upon on May 30 (C. P. No. 709(c)), and a third addendum was agreed upon on July 30. (C. P. No. 855) That stipulation as modified is approved.

I find that the Amended Plan (C. P. No. 478) filed March 26 by the Bank of New York as modified by the Second Amendment (C. P. No. 854) filed July 30 meets each of the requirements specified in 11 U.S.C. § 1129(a) and (b). The bank has invoked (C. P. No. 546) the cram down provisions of § 1129(b)(1). They are justified in this instance because the plan as amended does not discriminate unfairly and is fair and equitable with respect to each class of claims that is impaired under,

and has not accepted, the bank's plan. That plan, as amended, is confirmed.

The several plans filed by the debtors do not meet the foregoing statutory requirements. They have been rejected by the creditors and confirmation is denied with respect to each of the debtors' plans.

DONE and ORDERED at Miami, Florida, this 8th day of August, 1985.

/s/ Thomas C. Britton
THOMAS C. BRITTON
Bankruptcy Judge

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Vance Salter, Esquire
All creditors

APPENDIX I

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

[Case No. 85-3230-Civ-ATKINS]

OLYMPIA & YORK FLORIDA EQUITY CORP. and
MIAMI CENTER JOINT VENTURE,

Appellants,

vs.

THE BANK OF NEW YORK,

Appellee.

MEMORANDUM OPINION

Olympia & York Florida Equity Corporation (O&Y), as a general partner of Miami Center Joint Venture (MCJV), appeals from the bankruptcy court's Confirmation Order confirming a Chapter 11 plan of reorganization initiated by five debtors. Competing plans of reorganization were submitted to the creditors who rejected the debtors' plans and adopted the Bank of New York's (Bank's) plan. O&Y/MCJV asserts that its claim was improperly classified under this plan.

Pursuant to 11 U.S.C. § 1129(b), the court may confirm a plan even though a class has rejected it if all other requirements of § 1129(a) have been fulfilled and "the plan does not discriminate unfairly, and is fair and equitable," with respect to that class. *Id.* O&Y/MCJV, as the only creditors in Class 7, voted to reject the plan. Therefore, the question presented is whether the plan fulfilled the requirements of § 1129(b).

I. STATEMENT OF THE CASE

A. *The Parties and Their Respective Interests*¹

The five debtors include the Holywell Corporation, a Delaware corporation ("Holywell"), of which debtor Theodore B. Gould ("Gould") is the sole stockholder and president; Miami Center Limited Partnership, a Florida limited partnership ("MCLP") of which Gould and debtor Miami Center Corporation ("MCC") are sole general partners and are also limited partners; MCC, A Florida corporation and wholly-owned subsidiary of Holywell (Gould is also president of this entity); Chopin Associates, a Florida general partnership ("Chopin") of which Gould and MCC are the sole general partners; and Gould himself.

The Bank was the construction lender for Phase I of the debtors' "Miami Center" complex. That Phase consists of the Edward Ball Office Building, the Intercontinental Hotel (known as the "Pavillon" during the Gould group's ownership), retail space between them known as the "Podium," and an adjoining parking garage (collectively known as the "Miami Center Project"). The Bank has its offices in New York, New York, and is chartered under the laws of the State of New York.

MCJV is a Florida general partnership formed by debtor Gould and O&Y. At all material times, Gould served as "managing venturer" and general partner of MCJV. MCJV owns four vacant lots near the existing Miami Center Project. Gould and O&Y, as the only partners, originally planned to construct Phases II and III of Miami Center on those lots, but disputes and arbitration between the two partners has precluded further construction or development.

¹ Attached as court appendices I and II are two diagrams which set forth, graphically, the relationship between the various entities involved in this bankruptcy proceeding.

Over 400 other creditors have or had an interest in these proceedings, including the IRS, the Dade County Tax Collector, many of the contractors and subcontractors involved in the construction, former employees, and others. Creditors' committees were appointed by the bankruptcy court, and have been active for the Holywell, MCLP, and MCC estates.

B. *General Background Information*

During the summer of 1984, the Bank initiated foreclosure proceedings in state court after declaring the debtor's mortgage loans on the Miami Center to be in default. The debtors quickly responded by filing their voluntary petitions for reorganization on August 22, 1984. During the Chapter 11 reorganization proceedings, the debtors and the Bank filed competing reorganization plans. The various creditors' committees and individual creditors rejected the debtors' plans and adopted the Bank's plan, although it was rejected by the impaired classes 7-9. This plan was then confirmed by the bankruptcy court over the Class 7 creditors' objection pursuant to 11 U.S.C. § 1129(b) (1979).

Several appeals were taken from the various bankruptcy proceedings. Two of these appeals were closely related to this one. In one, *Bank of New York v. Olympia & York Florida Equity Corp.*, No. 85-3430-Civ- ATKINS (June 23, 1986), the Bank sought reversal of a final judgment and related orders of the bankruptcy court in an adversary proceeding. The bankruptcy court found that certain lease agreements relating to furniture, fixtures, and equipment (FF&E) within the Miami Center project were "true leases." After reviewing the bankruptcy court's orders and the lease agreements, I affirmed. This action was significant because it formed the foundation for O&Y/MCJV's priority claims as the owner/lessor of the FF&E.

Another appeal went before Judge Aronovitz in which he was asked to review the same confirmation order as it related to other classes under the Bank's plan. After reviewing the confirmation order, he found that the bankruptcy court failed to enter clear and concise findings of fact and conclusions of law which would support its order; therefore, he remanded the case. Following the proceedings on remand, Judge Aronovitz affirmed the amended confirmation order as it related to those aspects of the Bank's plan on appeal before him.

Having resolved the "true lease" issue which established the nature of O&Y/MCJV's claim as to the FF&E, I carefully reviewed the confirmation order as it related to Class 7 of the plan. Like Judge Aronovitz, I found that it was necessary to remand the case for a more detailed order clearly elucidating the basis for the bankruptcy court's decision to place O&Y/MCJV's claim in class 7 of the plan.² On November 10, 1986, the bankruptcy court concluded its remand proceedings and entered its Order on Remand in which it adopted the proposed findings of fact and conclusions of law submitted

² Remand proceedings were appropriate under *Wilson v. Huffman* (*In re Missionary Baptist Foundation of America*), 712 F.2d 206 (5th Cir. 1983). There, the district court evaluated the record to find sufficient findings of fact to satisfy each of *Mobile's* three elements for equitable subordination. The Fifth Circuit remanded the case saying:

These findings, though perhaps inherent in the bankruptcy court's ruling, were not enunciated. Though we agree that Huffman's insider connection with the debtor compels close examination of his claim, we cannot conclude, in the absence of explicit findings by the bankruptcy court on each element of the *Mobile* test, that the trustee has discharged his burden of proof thereunder.

Id. at 212 (emphasis added).

by the Bank.³ Thus, the initial Confirmation Order, as amended by the adoption, *nunc pro tunc*, of the explicit findings of fact and conclusions of law, constitutes the foundation for O&Y/MCJV's appeal.⁴

C. *The Nature of the O&Y/MCJV Claim*

The appeal before this court concerns only the rights and claims of MCJV, prosecuted by O&Y as its general partner, and managing venturer relating to the FF&E leases. Originally, O&Y filed separate claims as a creditor; however, in conjunction with the Trustee's consent to entry of the final modified arbitration award, O&Y issued a formal release of all its own claims against debtor Gould.⁵ O&Y/MCJV asserts that it has priority

³ O&Y/MCJV challenges the propriety of the bankruptcy judge's verbatim adoption of the Bank's proposed findings and conclusions, and asserts that the "blanket adoption" of one party's findings and conclusions indicates that the court failed to conduct a thorough, independent analysis of the evidence and the law. While this practice has been severely criticized, see *Cabriolet Porsche-Audio v. American Honda Motor Company*, 773 F.2d 1193, 1198 n.2 (11th Cir. 1985), it is permissible. See *Anderson v. Bessemer City*, 470 U.S. —, 105 S.Ct. 1504 (1985). Nevertheless, such a practice invites particularly close scrutiny of the findings in light of the record.

⁴ On remand, the bankruptcy court correctly determined that it was not called upon to alter or enhance the record. I simply wanted a more detailed explanation concerning the basis for the court's approval of the plan. Therefore, the record, as it stood at the time of confirmation, must support the amended findings.

⁵ O&Y and Gould initiated arbitration proceedings against each other in 1982 based upon their conflicting views regarding the operation of MCJV. The bankruptcy court permitted O&Y to pursue its rights under the relevant arbitration statutes and to proceed to an award in a court of competent jurisdiction, although it recognized that these proceedings could affect O&Y's and Gould's interests in MCJV. The final modified award was executed by the arbitrators on June 30, 1986 and entered as a judgment in the Florida Circuit Court on July 10, 1986.

claims for the market value of the FF&E, the cumulative defaulted rental payments and late charges accrued from March 1, 1983 to October 10, 1985, and defaulted rental payments and late charges from October 10, 1985.⁶

II. DISCUSSION

This appeal presents many complex legal issues. Over 400 parties struggled through the bankruptcy proceedings, under that court's supervision, attempting to make the best of an undesirable situation. The plan has been substantially consummated, and appears to have been successfully implemented.⁷ Nevertheless, O&Y/MCJV vehemently objects to the placement of its claim concerning the FF&E into class 7 of the plan. Conversely, the Bank argues that this classification was eminently correct, because it satisfied all statutory requirements under the Code.

A. *Standard of Review*

A district court must accord substantial deference to the bankruptcy court's findings of fact, and should reverse only when they are "clearly erroneous." *Wilson v. Huffman (In re Missionary Baptist Foundation of America)*, 712 F.2d 206, 209 (5th Cir. 1983); Bankruptcy Rule 8013. Moreover, the bankruptcy court's balancing of equities in analyzing the plan's fairness is a factual process, therefore, the court's determination on this point is also subject to the "clearly erroneous" standard of review. *Danning v. General Motors Acceptance Corp. (In*

⁶ MCLP was supposed to make rental payments to MCJV under the lease agreement as of March 1, 1983. On October 10, 1985, the trustee transferred his interest in the FF&E to the Bank and its designated transferee.

⁷ The claims classified under the plan from Class 1 to Class 6 have either been paid in full or funds have been reserved for the disputed items. In addition, in the most recent reports, the Liquidating Trustee estimated that approximately \$3 million will be available to satisfy the remaining claims.

re *Jules Meyers Pontiac, Inc.*), 779 F.2d 480, 482 (9th Cir. 1985). Conclusions of law, however, are subject to plenary review. *Machinery Rental v. Herpel (In re Multiponics)*, 622 F.2d 709, 713 (5th Cir. 1980) (hereinafter referred to as "Multiponics").

B. *Classification Under The Code*

A Chapter 11 plan of reorganization may involve the sale of all or substantially all of the debtor's assets. 11 U.S.C.A. § 123(b)(4) (1979). After all, one of the primary goals of the bankruptcy code is to effectuate an equitable distribution of the debtor's assets in satisfaction of its debts. *Benjamin v. Diamond (In re Mobile Steel Co.)*, 563 F.2d 692, 698 (5th Cir. 1977). To achieve the goal, the plan must group the claims or interests by classes. 11 U.S.C.A. §§ 1122, 1123 (1979) *; Bankruptcy

* 11 U.S.C.A. § 1122(a) provides:

Except as provided in subsection (b) of this section, a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class.

11 U.S.C.A. § 1123 provides (in pertinent part):

(a) Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall—

(1) designate, subject to section 1122 of this title, classes of claims, other than claims of a kind specified in section 507(a)(1), 507(a)(2) or 507(a)(7) of this title and classes of interests;

(2) specify any class of claims or interests that is not impaired under the plan;

(3) specify the treatment of any class of claims or interests that is impaired under the plan;

(4) provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest;

(5) provide adequate means for the plan's implementation....

Rule 3013. "The classes which hold priority claims must be specially organized and full payment is mandatory although the payment may be deferred." R. Aaron, *Bankruptcy Law Fundamentals*, § 1.04 at 1-22 (1986) (footnote to citations omitted) .

The Bank urges that its plan is acceptable because the classification of the MCJV lease claims is fair and equitable, and does not discriminate unfairly under § 1129(b).⁹ Furthermore, the Bank asserts that O&Y/MCJV's claim is not substantially similar to other claims or interests, because 50% of any distribution on MCJV's claim would go to debtor Gould. However, having reviewed the facts and the relevant legal principles, I conclude that the Bank is incorrect.

Under the Bank's plan, O&Y/MCJV's claim cannot be paid until all claims filed by other creditors not affiliated with Gould have been satisfied. In effect, this classification structure means that even general unsecured creditors will be paid before O&Y/MCJV. To justify its treatment of the O&Y/MCJV claim, the Bank relies heavily on the factual premise that any distribution on the O&Y/MCJV claim will benefit Gould. However, this premise is incorrect. Any payment to O&Y/MCJV based on the FF&E leases *would not* benefit debtor Gould. In fact, Gould's share of any MCJV proceeds, rents, or profits are available to the liquidating trustee, since "all legal or equitable interests of the debtor in property as of the commencement of the case," or any "[p]roceeds, . . .

⁹ 11 U.S.C.A. § 1129(b)(1) provides:

(b)(1) Notwithstanding section 510(g) of this title if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

rents, or profits of or from property of the estate . . ." become part of the bankruptcy estate. 11 U.S.C.A. § 541(a) (Supp. 1986) (emphasis added). See also *In re Wallen*, 43 Bankr. 408, 409 (D. Idaho 1984); *Houchen v. Gadberry* (*In re Gadberry*), 30 Bankr. 13, 14 (C.D. Ill. 1983); *Dominican Fathers of Winona v. Dreske* (*In re Dreske*), 25 Bankr. 268, 271 (E.D. Wis. 1982); *Don/Mark Partnership v. James B. Nutter & Co.*, (*In re Don/Mark Partnership*), 14 Bankr. 830, 832 (D. Colo. 1981); cf. *Missouri v. Eastern District of Arkansas*, 647 F.2d 768 (8th Cir. 1981) (court held that debtor's 2.3% fractional interest in deposited grain was sufficient to bring all property under the bankruptcy court's jurisdiction). In short, any interest Gould held in MCJV became part of the bankruptcy estate upon the commencement of this case.

The Bank's position is incorrect for another reason. The plan must satisfy the requirements of code sections 1122, 1123, and 1129. While the Bank feels that the plan's classification structure fulfills all of these code requirements, I disagree.

Classification is simply the process under which the plan's proponent recognizes the legal differences between various claims and interests, and ranks them according to their nature and priority. See *Scherk v. Newton* (*In re Rocky Mountain Fuel Co.*), 152 F.2d 747, 750-51 (10th Cir. 1945); *Seidel v. Palisades-on-the Desplains* (*In re Palisades-on-the Desplains*), 89 F.2d 214, 217 (7th Cir. 1937). See also 11 U.S.C.A. § 1129(b) (1979). A party submitting a plan of reorganization has considerable discretion to determine the proper classification of claims and interests according to the unique factual circumstances presented; however, ". . . there must be some limit on a debtor's power to classify creditors in such a manner. The potential for abuse would be significant otherwise." *Teamsters National Freight Industry Negotiating Committee v. U.S. Truck Co.* (*In re U.S. Truck*

Co.), 800 F.2d 581, 586 (6th Cir. 1986). The result is not surprising—considerable discretion is permitted in determining the proper classification of claims and interests; however, if the plan unfairly creates too many or too few classes, or violates basic priority rights, the court cannot confirm the plan. *See id.* Thus, classification principles cannot be employed to effectuate the subordination of valid claims. *See In re Martin's Point Limited Partnership*, 12 Bankr. 721 (Bankr. N.D. Ga. 1981); 11 U.S.C.A. § 1129(b).

One final point merits discussion under the "classification" issue. In its initial brief, the Bank argued that the MCJV claim is partially an equity interest. Yet, even if this assertion were true, it would not justify the subordination of a valid claim. *Id.* at 727 ("... a claim of a creditor who is also an equity security holder is not to be subordinated to the claim of a creditor who is not also an equity security holder, but is to be treated equally.").

C. *Claims of An Insider*

In support of the plan's classification structure, the Bank emphasizes O&Y/MCJV's status as an insider.¹⁰ The Bank argues that appellant's status is significant for two reasons. First, the Bank urges that insider creditors may not be given the same priority as unsecured creditors. *In re Toy & Sports Warehouse, Inc.*, 37 Bankr. 141, 152 (Bankr. S.D.N.Y. 1984) *In re Economy Cast Stone Co.*, 16 Bankr. 647, 651 (Bankr. E.D. Va. 1981). Alternatively, the Bank asserts that an insider creditor's claims must be closely scrutinized to determine whether equitable subordination is warranted. *Estates v. N&D Properties, Inc. (In re N&D Properties, Inc.)*, 799 F.2d

¹⁰ MCJV is an insider because it is a "partnership in which the debtor is a general partner." 11 U.S.C.A. § 101(28)(A)(ii) (Supp. 1986). O&Y is an insider because it is a "general partner of the Debtor." 11 U.S.C.A. § 101(28)(A)(iii) (Supp. 1986).

726, 731 (11th Cir. 1986); *Multiponics*, 622 F.2d 709, 714 (5th Cir. 1980). If the claimant is an insider, the party seeking equitable subordination need present only "material evidence of unfair conduct," and need not provide proof of, "more egregious conduct such as fraud, spoilation or overreaching." *Estes* at 731.

O&Y/MCJV responds with two arguments. First, appellant contends that it is not an insider in the legal connotation of the term. Second, appellant assumes a "fallback" position arguing that the mere invocation of the term "insider" without more, does not serve to meet any standard or test required by law for equitable subordination.

The code is clear regarding the definition of an insider. In this case, it is beyond question that O&Y and MCJV are insiders. See 11 U.S.C.A. § 101(28) A(ii) and (iii). However, the insider label is not sufficient, in and of itself, to justify the subordination of a claim. Insiders' claims and rights must be treated in the same manner as other rights and claims in the absence of proof of nefarious or inequitable conduct directed toward and resulting in harm to creditors. See *Estes* at 731; *Multiponics* at 713; *Huffman* at 212. Further, appellant asserts that even where the claimant is an insider the proponent of the plan bears the burden of presenting material evidence of inequitable and unfair conduct damaging the creditors. See *Multiponics* at 714; *Estes* at 731.

Two cases are particularly relevant regarding the subordination of an insider's claim. In *Huffman*, the fifth Circuit found that "Huffman was an insider." *Id.* at 211. Nevertheless, the court indicated that the three-prong test of *Mobile* still had to be satisfied. "Though we agree that Huffman's insider connection with the debtor compels close examination of his claim, we cannot conclude, in the absence of explicit findings by the bankruptcy court on each element of the *Mobile* test, that the trustee has discharged his burden of proof thereunder." *Id.* at 212.

Very recently, the Eleventh Circuit examined this issue in *Estes*, and followed the teachings of *Mobile* and *Huffman*. The court expressly stated that three elements must be established before a claim may be equitably subordinated. See *Estes* at 731. Where the claimant is an insider, the trustee's burden of proof in establishing evidence of unfair conduct is somewhat lessened, but the claim is not automatically subordinated. See *id.*¹¹

D. *Equitable Subordination*

The principle of subordination is firmly established in bankruptcy proceedings. This doctrine permits the court to lower the priority of a valid claim to achieve an equitable result when the claimant has been guilty of improper conduct.¹² *Collier on Bankruptcy* ¶ 510.02 (15th Ed. 1986). Although the doctrine was judicially created,¹³ it has now been codified within the bankruptcy code. Currently, the relevant provision is found at 11 U.S.C.A. § 510(c) which provides:

§ 510 Subordination

* * *

(c) Notwithstanding subsection (a) and (b) of this section, after notice and a hearing, the court may—

¹¹ Significantly, I note that Congress specifically rejected a provision which would have automatically subordinated certain insider claims as a matter of law. See S. Rep. No. 989, 95th Cong., 2 Sess. 74 (1978); H. R. 31, 95th Cong., 1st Sess. (1975).

¹² Subordination is not the same as disallowance. "If a creditor's misconduct has been directed toward the debtor . . . the claim . . . is disallowed." 3 *Collier on Bankruptcy*, ¶ 510.02 (15th Ed. 1986). Subordination is employed when a claim is valid, but the claimant's conduct is such that equitable considerations require it to be paid after other claims have been satisfied. See *id.*

¹³ Under the previous Act, courts subordinated creditor's claims based upon the bankruptcy court's grant of equitable jurisdiction. See *Pepper v. Litton*, 308 U.S. 295 (1939).

(1) under principles of equitable subordination, subordinate for purposes of distribution all or part of an allowed claim to all or part of another allowed claim or all or part of an allowed interest to all or part of another allowed interest, or

(2) order that any lien securing such a subordinated claim be transferred to the estate.

Section 510(c) authorizes subordination when the court finds that an equitable remedy is required. Established case law, however, continues to be significant because § 510(c) indicates that its application should follow equitable principles. *See 3 Collier on Bankruptcy* ¶ 510.01 (15th Ed. 1986). To resolve subordination situations, the Fifth Circuit established a three part test to determine when a claim or interest should be subordinated. *See Mobile* at 700. This test has been expressly adopted by the Eleventh Circuit. *See Estes* at 731. The three elements of the test include:

(1) that the claimant has engaged in inequitable conduct;

(2) that the conduct has injured creditors or given unfair advantage to the claimant; and

(3) that subordination of the claim is not inconsistent with the Bankruptcy Code.

Id. (citation omitted).

In proving the elements for equitable subordination, one must first determine the status of the claim holder.

The burden and sufficiency of proof required are not uniform in all cases. Where the claimant is an insider or a fiduciary, the trustee bears the burden of presenting material evidence of unfair conduct. Once the trustee meets his burden, the claimant then must prove the fairness of his transactions with the debtor or his claim will be subordinated. If the

claimant is not an insider or fiduciary, however, the trustee must prove more egregious conduct such as fraud, spoliation, or overreaching, and prove it with particularity.

Id. (citations omitted). Additionally, the trustees, or other moving party, must show the extent of any inquiry or unfair advantage to determine the extent to which the claim should be subordinated. The claim should only be subordinated to the extent necessary to offset the harm caused by the unfair conduct. See *Benjamin*, at 701, "For example, if a claimant guilty of misconduct asserts two claims, each worth \$10,000, and the injury he inflicted on the bankrupt or its creditors amounted to \$10,000, only one of his claims should be subordinated." *Id.* at 701. Finally, the evidence must show which creditors were disadvantaged, because a valid claim should only be subordinated to the claims of the disadvantaged creditors. See *Estes* at 732-33.

In ~~this~~ case, the bankruptcy court appears to have relied upon three facts to fulfill *Mobile's* tripartite test. First, the court imputed Gould's acts of misconduct to O&Y/MCJV as a matter of partnership and agency principles. Second, the court found that O&Y/MCJV was responsible for MCLP's undercapitalization. Third, the court found that O&Y substantially contributed to MCJV's and Gould's financial difficulties, to the detriment of other creditors, by failing to provide or arrange for the financing of Phases II and III of the Miami Center.

O&Y/MCJV challenges all of these facts and asserts that there is no semblance of proof of wrongful conduct of the claimant/appellant affecting the debtors' creditors. First, O&Y/MCJV argues that all of Gould's acts of misconduct were outside the course and scope of the partnership's business. In fact, Gould's conduct was *against* O&Y and the partnership's interest. Therefore, appellant urges that Gould's misconduct cannot be used to sub-

ordinate its claim. Second, O&Y/MCJV suggests that the theory of undercapitalization of MCLP is outrageous and incomprehensible. Appellant insists that MCJV was the victim of, not a contributor to, MCLP's poor financial situation. Finally, appellant states that everyone recognized that the construction of phases II and III of the Miami Center would have subjected Gould to even greater losses and further indebtedness. Thus, appellant's failure to provide financing for further development could not have injured any of the debtor's creditors.

After carefully considering the facts, I conclude that the evidence was inefficient to satisfy the elements of equitable subordination. First, I find that the court erred when it imputed Gould's acts of misconduct to O&Y/MCJV. These acts were clearly outside the ordinary course of the business of the partnership and not authorized by O&Y. *See Fla. Stat. Ann.* § 620.62 (1977).¹⁴ Second, I simply cannot accept appellee's theory of undercapitalization. Perhaps the best indication that the FF&E lease was valuable was that the trustee was required to obtain title to the FF&E under the plan. Therefore, it is unreasonable to believe that the valuable FF&E lease agreements injured any of the debtor's creditors, even if I could somehow attribute MCLP's financial situation to O&Y/MCJV. Finally, I find that insufficient evidence was offered to prove that O&Y's failure to provide further financing hurt any creditors or gave O&Y

¹⁴ *Fla. Stat. Ann.* § 620.62 (1977) reads as follows:

Partnership bound by partner's wrongful act.—When loss or injury is caused to a person, not a partner in the partnership, or any penalty is incurred by a wrongful omission of a partner acting in the ordinary course of the business of the partnership or with the authority of his copartners, the partnership is liable for it to the same extent as the partner so acting or omitting to act. (emphasis added).

an unfair advantage. Under the circumstances, O&Y's decision seems sound.

III. CONCLUSION

After carefully reviewing the amended confirmation order, I find that the court erred in confirming the plan which placed the O&Y/MCJV lease claim in class 7 beneath even the unsecured creditors. The plan, as structured, is not fair and equitable with respect to the class 7 creditor. None of the theories presented by the Bank justify the subordination of O&Y/MCJV's claim. I must, therefore, remand the case so that the bankruptcy court can determine O&Y's share of the claim.

On remand, the bankruptcy court must resolve two issues. First, the bankruptcy court should determine the value of the lease claim. Then, it should determine the respective interest in this claim held by O&Y and the bankruptcy estate (in lieu of debtor Gould).¹⁵

Because the parties are in substantial disagreement regarding the payment of the claim, I feel compelled to resolve this point. O&Y should be paid:

(1) First, from the cash which remains available to the trustee;

(2) Second, from any property controlled by the trustee including Gould's interest in MCJV; and

(3) Finally, from the surety bond provided by the Bank to guarantee O&Y's payment under the plan.

For all of the reasons expressed in this opinion, the order of confirmation is reversed and remanded for further considerations not inconsistent with this opinion.

¹⁵ O&Y and the Bank continue to dispute the interest each party holds concerning the lease claim. The bankruptcy court must determine what effect, if any, the arbitration proceeds have had which would alter the general partners' 50% interests.

DONE AND ORDERED at Miami, Florida, this 24
day of March, 1987.

/s/ C. Clyde Atkins
C. CLYDE ATKINS
United States District Judge

cc: John Kozyak, Esq.
Albert I. Edelman, Esq.
Scott D. Sheftall, Esq.
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[Court Appendix I and II Omitted in Printing]

APPENDIX J

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 84-01590-BKC-TCB
Chapter 11

IN RE: HOLYWELL CORPORATION, *et al.*,
Debtors.

ORDER DIRECTING STATUS CONFERENCE
AND SETTING HEARINGS

The liquidating plan presented by the Bank was confirmed over a year-and-a-half ago. Trustee's counsel has been directed repeatedly to bring this case to substantial consummation of the plan in order that the case may be closed and administrative expense terminated. Last fall, the trustee's counsel anticipated substantial consummation by the first of the year but appears no closer to that objective today.

1. Accordingly, a status conference will be held Monday, March 30, 1987 at 9:30 a.m. in Courtroom 1406 at 51 SW 1st Avenue, Miami, Florida at which time the trustee's counsel is directed to submit a schedule of matters that must be concluded for substantial consummation of the plan and closing of the case, specifying in each instance the dollar impact of the unresolved issue and the estimated date of resolution, and describing the steps taken by him or other parties to resolve the issue since October 1, 1986. Counsel is also directed to present an accounting reflecting the receipts and disbursements to date, the present disposition of surplus funds and the current interest being earned on those funds.

It is my understanding that the trustee must rely entirely on counsel and other parties to conclude this case, therefore, the trustee's attendance at the status conference is unnecessary.

2. At the foregoing hearing, notice is given that the court will consider the scheduling of a hearing to resolve all ad valorem tax litigation presently pending between the estate and Dade County. Although the automatic stay was modified to permit the parties to resolve these issues in the state court several years ago, I am informed that no dispute has yet been tried and none is presently scheduled for trial and that the trustee has elected, without this court's knowledge or approval, to burden the District Court with consideration of all these disputes.

3. A hearing will be held on Thursday, April 16, 1987 at 9:30 a.m. in Courtroom 1406 at 51 SW 1st Avenue, Miami, Florida to fix the amount of the MCJV Class 7 claim.

DONE and ORDERED in Miami, Florida this 20th day of March, 1987.

/s/ Thomas C. Britton
THOMAS C. BRITTON
Chief Bankruptcy Judge

Copies to:

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APPENDIX K

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 85-3230-Civ-Atkins

IN RE: HOLYWELL CORPORATION, *et al.*,
Debtors.

OLYMPIA & YORK FLORIDA EQUITY CORP. and
MIAMI CENTER JOINT VENTURE,
Appellants,

vs.

THE BANK OF NEW YORK,
Appellee.

MEMORANDUM OPINION

Appellants, Olympia & York Florida Equity Corp. ("O&Y") and O&Y as general partner and on behalf of Miami Center Joint Venture ("MCJV"), seek reversal of the Confirmation Order approving the Bank of New York's modified plan which subordinates appellants' claims to the payment of all other unaffiliated creditors. After reviewing the confirmation order and the record, I find that the bankruptcy court failed to provide the findings of fact necessary to support its conclusions. Without this information, I cannot adequately review and decide the issues on appeal. Thus, I must remand the case for further determination not inconsistent with this order.

Statement of the Case

The debtors, who are not parties to this appeal, initiated the underlying bankruptcy proceedings under Chapter 11 on August 22, 1984. The appellants, Olympia & York Florida Equity Corp. ("O&Y") and O&Y as general partner and on behalf of Miami Center Joint Venture ("MCJV"), had transactions with two of the debtors—Mr. Theodore B. Gould ("Gould") and the Miami Center Limited Partnership ("MCLP").

O&Y/MCJV's claims are against MCLP for which Gould and Miami Center Corporation ("MCC") are also obligated as the general partners of MCLP. Appellants claim is founded upon the FF&E lease agreements (Leases "A" and "B") in which MCJV purchased the furniture, fixtures, and equipment necessary for the operation of MCLP's hotel with funds advanced to MCJV by O&Y. In turn, MCJV leased the FF&E MCLP under the terms and conditions of the lease agreements.¹

Appellant O&Y's claims are against Gould. These claims relate to Gould's obligations to O&Y as general partner in the MCJV joint venture partnership. Currently, MCJV owes O&Y in excess of 60 million dollars. Since Gould is a general partner, he is a guarantor of MCJV's debt to O&Y.

The Bank of New York ("Bank"), appellee, was the largest creditor of the debtors holdings claims in excess of 240 million dollars. The Bank formulated a single substantively consolidated plan which, as amended, consists of the following principle features.

(a) The Bank acquired the Miami Center project, including the FF&E, for its MAI-appraised fair market value of \$255,600,000. That purchase price included (1)

¹ These lease agreements were found to be "true leases" by the bankruptcy court in its June 24, 1985 Memorandum Decision which was recently affirmed by this Court.

a credit for outstanding principal and interest with interest computed at the lower, "good standing" rate and (2) cash for the balance after giving effect to customary pro-rations and closing expenses.

(b) The net cash proceeds of the sale, together with the Bank's cash collateral of approximately \$30,000,000 and the debtor's other remaining assets, were turned over to a "Liquidating Trustee," for the payment of all allowed claims.

(c) The Bank agreed to provide \$14,417,679 for payment by the Liquidating Trustee to O&Y and/or MCJV, in the event that they prevail in amount and classification of their FF&E claims. (This agreement is now backed by a 15 million dollar Corporate surety bond.) This provision was required because the appellants objected to the subordination of their claims to class 7 which is below the claims of general and unsecured creditors.

Pursuant to the bankruptcy court's orders, the confirmation hearing for the Bank's Consolidated Plan and the debtors' Plans² was scheduled for April 29, 1985. However, because of the number of objections filed by various creditors, the court deferred holding a confirmation hearing on the plans until the proponents assessed and certified the creditors votes for the various plans, and the clerk's office certified the vote. No confirmation hearing was held on objections to the Bank's plan. Similarly, no hearing was held on the issues of subordination or classification of appellant's claims and interest, and no opinion was rendered regarding the subordinate classification of O&Y/MCJV's lease claims in spite of the adjudication of their status as owners/lessors of the FF&E. Finally, no hearing was held regarding debtors' and OBY [sic]/MCJV's objection that the Bank's plan was not fair and equitable.

² The debtor's plans were rejected by the creditors and by the bankruptcy court.

The Bank and the Unsecured Creditors Committee of the debtors negotiated a series of four stipulations. These stipulations were designed to satisfy the creditors and had the effect of amending the plan. The bankruptcy court approved the stipulations in its Confirmation Order without holding a hearing or ordering separate disclosure statements.

The Bank filed a Second Amendment to its plan which attempted to alleviate problems with the subordination of the MCJV lease claim by agreeing to pay the claim if subordination was found to be improper. O&Y/MCJV objected to the terms of the amendment. Nevertheless, the court approved it without holding a hearing or requiring a new disclosure statement.

Judge Britton entered the Confirmation Order on August 8, 1985. In it he stated:

I find that the Amended Plan (C. P. No. 478) filed March 26 by the Bank of New York as modified by the Second Amendment (C. P. No. 854) filed July 30 meets each of the requirements specified in 11 U.S.C. § 1129(a) and (b). The bank has invoked (C. P. No. 546) the cram down provisions of § 1129 (b) (1). They are justified in this instance because the plan as amended does not discriminate unfairly and is fair and equitable with respect to each class of claims that is impaired under, and has not accepted, the bank's plan. That plan, as amended, is confirmed.

However, the court never articulated the basis for subordinating appellants' claims to the payment of all other unaffiliated creditors. The court did state, "[t]he circumstances do not require and time simply does not permit a review and discussion of all these issues in this order."

*The Scope of Review and Necessity of Adequate
Findings of Fact and Conclusions of Law*

It is well settled that a district court must accord substantial deference to the bankruptcy court's findings of fact, reversing these only when they are "clearly erroneous." In *Re Missionary Baptist Foundation of America*, 712 F.2d 206, 209 (5th Cir. 1983). Conclusions of law, however, are subject to plenary review by the district court. In *Re Multiponics*, 622 F.2d 709, 712 (5th Cir. 1980). Yet, case law suggests that, where the bankruptcy court's findings are inadequate (or altogether absent) for purposes of review, then the "clearly erroneous" standard can be discarded, leaving the trial court's entire determination of the case freely reviewable. See *Watson v. Thompson*, 456 F. Supp. 432, 436 (S.D. Ga. 1978). Furthermore, the district court may make its own findings of fact, provided that there is no dispute as to the underlying facts. See, e.g., *In Re Neis*, 723 F.2d 584, 589 (7th Cir. 1983).

In a related matter, Judge Aronovitz discussed the importance of the trial court's findings of fact and conclusions of law.

The requirement that a trial court, acting without a jury, make explicit findings of fact and conclusions of law serves several purposes. Not only does it aid the appellate court in clearly understanding the proceedings below and the basis for the trial court's ruling, but it ensures that trial courts engage in a carefully reasoned analysis of each case. The requirement that trial courts enter findings of fact and conclusions of law in appropriate cases has long been a part of the Federal Rules of Civil Procedure. Rule 52 is made applicable to certain proceedings in bankruptcy by *Fed. R. Bankr. P.* 7052, which requires the bankruptcy court to enter findings of fact and conclusions of law in adversary proceedings. Hearings on substantive consolidation and confirmation

at issue here were *adversary* proceedings as that term is defined in *Fed. R. Bankr. P.* 7001. These hearings below were "contested" matters as herein-after defined. Also, under general procedural and/or substantive provisions applicable wherein the trial court is sitting in equity to review rulings by a bankruptcy judge in matters founded in equity, findings of fact and conclusions of law are required. The requirements of *Fed. R. Civ. P.* 52(a) are nonetheless applicable to the instant appeal.

Fed. R. Bankr. P. 9014 extends the application of Rule 7052 to "contested matters." The appellants' objection to the final order of confirmation is explicitly made subject to Rule 9014 by *Fed. R. Bankr. P.* 3020(b). Thus, the Bankruptcy Judge should have made and entered clear and concise findings of fact and conclusions of law to support the orders from which this appeal is taken. This was not done. Such findings and conclusions as exist are inadequate for purposes of review.

Holywell Corp. v. Bank of New York, No. 85-3225 (S.D. Fla. Dec. 30, 1985) (order of remand) (footnotes omitted) (citations omitted).

Judge Aronovitz proceeded to examine the issues raised on appeal. Many of the issues he addressed are similar to those presented here. For example, both appeals involve the following:

- (a) the doctrine of equitable subordination;
- (b) the need for a valuation hearing;
- (c) the unfair discrimination of similarly situated creditors under the plan or reorganization; and
- (d) whether the bankruptcy court denied the parties due process by refusing their requests for hearings and disclosure of amendments to the plan.

He stated, "this Court has been left with the impeded, if not impossible, task of trying to apply a 'clearly erroneous' standard of review to findings of fact that are either non-existent or too vague to support adequate review." *Id.* at 8. Concerning the confirmation order, Judge Aronovitz noted:

In the bankruptcy court's order confirming the Bank of New York's Plan of Reorganization, the lack of explicit findings is even more disturbing. The Bank's plan is the centerpiece of the entire Chapter 11 proceeding below, affecting, as it does, significant rights and interests of creditors and debtors alike. . . .

In view of the important substantive rights which are inevitably affected by the Bank's plan, much more detailed treatment of both the legal reasoning and the underlying facts supporting these orders was required.

* * * *

It is clear from the record on appeal that here the bankruptcy judge never made the findings of fact necessary to satisfy the requirements of the tests cited above for equitable subordination and substantive consolidation. The same lack of accessible findings prevents this court from adequately reviewing the remainder of the issues presented in this appeal. For this reason, this Court has no alternative but to remand the entire matter before it to the bankruptcy court.

Id. at 9-11.

In the present appeal, I find myself in agreement with Judge Aronovitz. In fact, with respect to the lease claims, the appellant's position is particularly compelling. The bankruptcy court found that they were "true lease" holders. Moreover, the record indicates that the Bank filed the relevant UCC-1 forms reflecting and recording certain priority rights. Further, the Bank's counsel con-

ceded the extreme importance of the subordinate classification of the lease claims.

Treatment of the FF&E/lease claims and the classification of the in Class 7 and the decision that those claims are insider claims and should go behind the payments to the general unsecured creditors, the non-insider creditors, I would say that is the lynch pin of the plan.

[Court paper #800 at p. 24].

In short, in view of the importance of the issues on appeal and the conflicting evidence contained within the record, a more detailed discussion of the law and facts is required for an adequate review.

Conclusion

Judge Britton faced an extremely difficult task in handling this bankruptcy proceeding. The bankruptcy court dedicated a year to this matter. He considered over 1,000 pleadings and reams of evidence for the adversary proceedings. He had to consider the interests of over 400 parties. Most significantly the court was aware of the importance of resolving the matter quickly. Judge Britton knew that substantial interest was accruing on the \$200 million construction loan which jeopardized the collectability of the claims of all creditors. While I believe that Judge Britton probably has a sound basis for his conclusion, it is regrettable that he did not convey this information in his confirmation order.

Therefore, it is

ORDERED AND ADJUDGED that this cause is *remanded* to the United States Bankruptcy Court for the Southern District of Florida, to hold further adversarial hearings and to enter such findings of fact and conclusions of law as are necessary to provide this court with an adequate basis to resolve this appeal. This should be

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accomplished within sixty (60) days from the file stamp date of this order.

DONE AND ORDERED at Miami, Florida, this 30th day of June, 1986.

/s/ Clyde Atkins

United States District Judge

cc: All counsel & parties of record

Honorable Thomas Britton

APPENDIX L

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 85-3225-Civ-ARONOVITZ

MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER COR-
PORATION, THEODORE B. GOULD, CHOPIN ASSOCIATES,
and HOLYWELL, *Plaintiff,*
vs.

BANK OF NEW YORK,
Defendant.

ORDER DISMISSING APPEAL
AS MOOT

THIS CAUSE came before the Court upon the Eleventh Circuit's remand of this action to this Court.

THE COURT has considered the pertinent portions of the record, and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED that this bankruptcy appeal be, and the same is, hereby DISMISSED as moot. The Eleventh Circuit has remanded this case for "the entry of an order by Judge Aronovitz dismissing the appeal from the bankruptcy court as moot." *Miami Center Partnership v. Bank of New York*, 838 F.2d 1547, 1557 (11th Cir. 1988).

157a

DONE AND ORDERED in Chambers at Miami, Florida, this 20 day of May, 1988.

/s/ Sidney M. Aronovitz
United States District Judge

cc:

Vance Salter, Esq.
S. Harvey Ziegler, Esq.
Raymond Bergan, Esq.
Fred Kent, Esq.; Thomas Noone, Esq.
Theodore Gould

APPENDIX M

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA**

JUDGE THOMAS C. BRITTON

No. 84-01590

IN THE MATTER OF HOLYWELL CORPORATION, *et al.*,
Debtors.

**CONFERENCE
(IN CHAMBERS)**

May 15, 1987

The above-entitled cause came on for Conference in Chambers before the Honorable Thomas C. Britton, one of the Judges of the United States Bankruptcy Court, 51 Southwest 1st Avenue, Miami, Dade County, Florida, on Friday, May 15, 1987, and the following proceedings were had:

APPEARANCES:

HOLLAND & KNIGHT, by IRVING MARK WOLFF, Esquire, Attorneys for the Liquidating Trustee.

MR. FRED STANTON SMITH, Liquidating Trustee.

[3] THE COURT: But I have got it on now and I have just explained to Mr. Wolff and to Mr. Smith that I am making a tape of this for the benefit of all three of

us should there ever be a question of what was said here, and the reason I am not having this before the court reporter and in the courtroom is that I think it would possibly cause unnecessary embarrassment to one of the individuals involved and I would like to avoid that if I can.

My purpose in asking you to come here is that, Mr. Smith, I am going to ask you today to replace Mr. Wolff as your counsel and I want to explain to both of you why and what my concern is.

There are two reasons: The first reason is the statements made and the posture taken by Mr. Wolff in his memo which was filed with the Court in your behalf, Mr. Smith, on May 1st, and that is Court Paper 6001.

That memo makes it very clear that Mr. Wolff feels that the confirmation order was erroneous, it should not have been entered, that the plan which this Court confirmed is defective and that there are other obstacles of a legal nature to his seeing his way clear to carrying out the confirmation order which directed you, Mr. Smith, to implement as [4] liquidating trustee and which I, of course, am committed to, having approved. I differ with Mr. Wolff, but whether I differed or not, I think that the parties to this lawsuit are entitled to a trustee who is advised by an attorney who believes that the order is legally sound and can be carried out. That is point one.

Point two is that I am disappointed, Irving, as I have told you before in the courtroom, with the pace at which we are moving in the liquidation here.

* * * *

[31] [THE COURT]: You mentioned Mr. Gould. There is no pleasing that man, either that or I have utterly wasted the last 40 years I have been spending in this business. There are some people that there is absolutely no doing business with, you simply roll over them or they roll over you, and Gould, in my mind, falls in that category. I don't expect either one of you to do any-

thing other than perhaps preserve a little civility with him and protect his legal rights, but that man has to be blasted out of the way, and to hope for the day when he will consent to everything and, therefore, put himself in a posture where he can never ever criticize, I think is fatuous.

Even if he signed his goddamned name to a piece of paper directing you to do something, he could very easily, and he is the kind of man who would, come into court a year or five years later and sue personally and saying that he was deceived into this and misled into it, there is a pattern that we see of this guy, and I don't think the O&Y [32] people are any better, in my opinion they are a bunch of crumbs and I am not immensely impressed with the bank either, and maybe it is just because I have got a cold and feel bad and I have been suffering with this case, but it is the worst case I have ever had, going the least satisfactorily and there has been the most waste—

* * * *

[33] THE COURT: I do, too. To some extent that is a possibility, but now that we are stuck with three different District Court judges looking over our shoulders and expecting certain things to take place, those things have to be done here. I cannot walk away and leave those unattended to and say, well, take it up with some clown across the street, that is not going to work, and it wouldn't be right if it did, so I am not going to do that.

I am going to hang onto this case until somebody pries me loose, long enough to see to it that the essential issues, the major issues, are decided at least here, and you are in a position where, unless those orders are superseded, you can carry them out. You see, one great strength that the Bankruptcy Court has, as Irving well knows, is that if an order of this Court is not superseded and that order is [34] performed, then it cannot be challenged any further, so that affords great protection, and if we had been able to carry out the entire plan very quickly,

there would have never been an appeal because they couldn't post the bond

* * * *

[38] THE COURT: —the man is a madman, I think, and it is characteristic of you that you go out of your way to be decent to him and treat him like a normal person, but I wouldn't be offended at all if you wrote a letter to him and told him that, "From this point on I ask you to communicate with me only through your counsel," and deal only with his attorney and ignore the guy. Maybe the attorney would be a more responsible person to deal with, he couldn't be any worse, and then if he puts you in a posture that you feel you need protection on, present it to the Court and let me take that responsibility for it, and I think that before we are all through, I am likely to be sued, I mean, this man is crazy, he will do anything.

* * * *

[42] THE COURT: —Herb Stettin, I am going to suggest that you talk to him. Mr. Stettin has had a great deal of bankruptcy experience, he enjoys an ethical reputation and stature in all respects, I think, comparable to Irving and I wouldn't suggest that it is [43] any better. He has the advantage that he is not associated with this case or with any of the parties at all, he has a very active and keen legal mind and has been very successful as a lawyer. He would be immensely candid with you, as Irving, of course, would, and he will give you an opinion, and I have no idea what his opinion will be.

I spoke to him very briefly to ask if he were available if the situation came up and he were called on, and he said he would be very pleased to do it. . . .

* * * *

[48] THE COURT: Well, one thing I have learned about the judicial apparatus and machinery, it is a great respecter of things that are done and things that work,

no matter how screwed up they may be. Take the very question of the entire jurisdiction of this Court. The United States Supreme Court came out with a decision saying that only an Article 3 judge can do what these judges do and, as Irving and I know, today, three years, four years later—

MR. WOLFF: They are doing the same thing they did then in spite of the Supreme Court and in spite of Congress.

THE COURT: —exactly, and if it goes back to the Supreme Court, without any question at all the Supreme Court is going to say it is okay, in other words, they will find a way to do it because it works, it works, and so we have got to make it work. We can't eliminate controversies, we can't eliminate the personalities that are involved—they sure are a problem.

. . . .

APPENDIX N

RELEVANT CONSTITUTIONAL AND
STATUTORY PROVISIONS

1. Article III, Section 2 of the Constitution of the United States provides in relevant part:

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party;—to controversies between two or more states;—between a state and citizens of another state;—between citizens of different states;—between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

2. Amendment V to the Constitution of the United States provides in relevant part:

No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

3. Amendment VII to the Constitution of the United States provides in relevant part:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

4. The relevant provisions of the Bankruptcy Reform Act of 1978 (11 U.S.C. Section 101 *et seq.**) are as follows:

SECTION 105 (11 U.S.C. § 105)

§ 105. Power of Court:

(a) the court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.

(b) Notwithstanding subsection (a) of this section, a court may not appoint a receiver in a case under this title.

. . .

SECTION 502 (11 U.S.C. § 502)

§ 502. Allowance of claims or interests.

(a) A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a partner in a partnership that is a debtor in a case under chapter 7 of this title, objects.

(b) Except as provided in subsections (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that—

(1) such claim is unenforceable against the debtor, and unenforceable against property of the

* The Chapter 11 Proceedings below were initiated on August 22, 1984. The 1984 Amendments to the Bankruptcy Code, with certain exceptions including Section 105, were made effective as to cases filed on or after October 10, 1985. Therefore, the Bankruptcy Code Sections set out in this paragraph 4 are in the form applicable to this case.

debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured;

(2) such claim is for unmatured interest;

* * *

SECTION 506 (11 U.S.C. § 506)

§ 506. Determination of secured status.

“(a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor’s interest in the estate’s interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor’s interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor’s interest.

(b) To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided under the agreement under which such claim arose.

(c) The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of,

such property to the extent of any benefit to the holder of such claim.

* * *

SECTION 1104 (11 U.S.C. § 1104)

§ 1104. Appointment of trustee or examiner.

(a) At any time after the commencement of the case but before confirmation of a plan, on request of a party in interest, and after notice and a hearing, the court shall order the appointment of a trustee—

(1) for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar cause but not including the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor; or

(2) if such appointment is in the interest of creditors, any equity security holders, and other interests of the estate, without regard to the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor.

* * *

SECTION 1123 (11 U.S.C. § 1123)

§ 1123. Contents of plan.

(a) A plan shall—

* * *

(4) provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest;

(5) provide adequate means for the plan's execution, . . .

* * *

SECTION 1128 (11 U.S.C. § 1128)

§ 1128. Confirmation hearing.

(a) After notice, the court shall hold a hearing on confirmation of a plan.

(b) a party in interest may object to confirmation of a plan.

SECTION 1129 (11 U.S.C. § 1129)

§ 1129. Confirmation of plan.

(a) The court shall confirm a plan only if all of the following requirements are met:

(1) The plan complies with the applicable provisions of the chapter.

(2) The proponent of the plan complies with the applicable provisions of this chapter.

(3) The plan has been proposed in good faith and not by any means forbidden by law.

* * *

(7) With respect to each class—

(A) each holder of a claim or interest of such class—

(i) has accepted the plan; or

(ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date; or

(B) if section 1111(b)(2) of this title applies to the claims of such class, each holder of a claim of such class will receive or retain under the plan on account of such claim property of a value,

as of the effective date of the plan, that is not less than the value of such creditor's interest in the estate's interest in the property that secures such claims.

(8) With respect to each class—

(A) such class has accepted the plan; or

(B) such class is not impaired under the plan.

* * *

(10) At least one class of claims has accepted the plan, determined without including any acceptance of the plan by any insider holding a claim of such class.

(11) Confirmation of the plan is not likely to be followed by the liquidation, or the need for further reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

(b) (1) Notwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

* * *

3. The relevant provisions of the Bankruptcy Amendments and Federal Judgeship Act of 1984 (Pub. L. No. 98-353) are as follows:

a. 28 U.S.C. § 1334(d) provides:

(d) The district court in which a case under title 11 is commenced or is pending shall have exclusive

jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of the estate.

* * *

5. Rule 52(a) of the Federal Rules of Civil Procedure provides:

Rule 52. Findings by the Court.

(a) **EFFECT.** In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 59; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 51(b).

2

Supreme Court, U.S.
FILED
JUL 5 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1988

in the
Supreme Court
of the
United States of America

OCTOBER TERM, 1987

THEODORE B. GOULD, HOLYWELL CORPORATION,
MIAMI CENTER LIMITED PARTNERSHIP, CHOPIN
ASSOCIATES, and MIAMI CENTER CORPORATION,

Petitioners,

vs.

THE BANK OF NEW YORK,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

BRIEF IN OPPOSITION OF RESPONDENT,
THE BANK OF NEW YORK

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ISSUES PRESENTED

I.

Did the Bankruptcy Court, District Court, and Court of Appeals all err in entering or reviewing an order conditioning a stay upon the filing of an appeal bond?

II.

Was the doctrine of mootness correctly applied by the lower courts to the facts of the case?

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NO. 87-1988

in the
Supreme Court
of the
United States of America

OCTOBER TERM, 1987

THEODORE B. GOULD, HOLYWELL CORPORATION,
MIAMI CENTER LIMITED PARTNERSHIP, CHOPIN
ASSOCIATES, and MIAMI CENTER CORPORATION,

Petitioners,

vs.

THE BANK OF NEW YORK,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

BRIEF IN OPPOSITION OF RESPONDENT,
THE BANK OF NEW YORK

INTRODUCTION

The Petitioners, five affiliated debtors in consolidated bankruptcy proceedings below, have presented their various claims and arguments over the past four years to:

Two different Bankruptcy Judges of the United States Bankruptcy Court for the Southern District of Florida;

Ten different District Judges of the United States District Court for the Southern District of Florida, in over twenty separate appeals from bankruptcy court rulings; and

Eight Judges of the United States Court of Appeals for the Eleventh Circuit, in four separate appeals from District Court orders.

In one of the Eleventh Circuit opinions, that Court took the unusual step of labelling most of the debtors' arguments as "frivolous."¹

STATEMENT OF THE CASE

The opinion of the Eleventh Circuit under review² was the culmination of three and one-half years of proceedings below. The five related debtor/Petitioners—Holywell Corporation ("Holywell"), Miami Center Limited Partnership ("MCLP"), Miami Center Corporation ("MCC"), Chopin Associates ("Chopin"), and Theodore B. Gould ("Gould")—filed voluntary petitions for reorganization under Chapter 11 in the United States Bankruptcy Court on August 22, 1984. The following day the Bankruptcy Court granted the debtors' motion for joint administration.

¹Opinion of March 18, 1988 in *Holywell Corp. v. Smith*, Case No. 87-5195 [App. 1] References to the Petitioners' appendix are denoted "____a," and references to the appendix to this Response are denoted "App. ____."

²Reported at 838 F.2d 1547 (11th Cir. 1988) and reprinted at 1a.

The filing of the petitions automatically stayed the then-pending state court foreclosure suit brought against the debtors by the Respondent Bank, as well as approximately 30 lawsuits and lien proceedings against the debtors brought by contractors, suppliers, another bank, the IRS, the Dade County Tax Collector, Gould's partners, and others. 11 U.S.C. §362. Over 400 creditors held claims totalling over \$350 million.

From the outset, the debtors sought to delay reorganization in the hopes that they could sell or refinance the Miami Center Project³ on favorable terms. The debtors twice sought and obtained additional time in which to file the required financial data. On December 7, 1984, the debtors moved for a two-month extension of time in which to file a plan. That motion was granted, and the debtors were permitted until February 15, 1985 to file a plan, but on a non-exclusive basis. Each of the five debtors filed a separate (but substantially-identical) plan and disclosure statement on the very last day of the extension period.

Next, the debtors sought to delay the Bank in establishing the extent, validity, and priority of its lien (because that secured claim was by far the largest—over \$240 million). The debtors filed a lawsuit in the United States District Court for the Southern District of Florida (“the District Court Action”) against the Bank and its participating lenders alleging fraud, RICO violations, and other claims in connection with the Miami Center construction loans made by the Bank. The debtors sought trial by jury. The debtors’ strategy apparently was to delay the Bank’s collection efforts for two years (or more) pending the jury trial of the District Court Action.

³The Miami Center Project consists of a 34-story office building, a 34-story hotel, a parking garage, and retail space connecting the office building and hotel.

Conscious that the interest accruing on the construction loans⁴ (principal was nearly \$200 million) was jeopardizing the collectibility of the claims of all creditors, the Bank sought to expedite the proceedings. On February 5, 1985, the Bank filed its complaint to determine the amount, validity, and priority of its liens. The debtors sought to stay those proceedings in the Bankruptcy Court, but the Bankruptcy Court declined to grant such a stay. Two days before the scheduled trial of the Bank's complaint to prove its lien, the debtors filed an "Emergency Motion for an Order of Withdrawal Under 28 U.S.C. §157(d) and to Stay Other Proceedings," requesting the trial judge in the District Court Action to withdraw certain claims from the Bankruptcy Court and to stay the determination of the Bank's lien. That emergency motion was heard the night before the scheduled Bankruptcy Court trial. The District Judge declined to stay or otherwise interfere with the Bankruptcy Court's jurisdiction, and the trial went forward as scheduled.

The Bankruptcy Court ruled that the Bank's lien was valid in all respects. The Bankruptcy Court determined the Bank's lien to be in the amount of \$234,342,742.19 through March 14, 1985, plus interest at \$75,320.16 per day thereafter (at the default rate, and subject to adjustments based on the Bank's published prime rate).⁵

The Bank also filed a competing disclosure statement and plan which won acceptance by the creditors and was confirmed by the Bankruptcy Court. The debtors then sought

⁴Interest at the default rate was accruing on the Bank's loans at over \$2,200,000 per month. [App. 5].

⁵App. 4.

to delay implementation of the Bank's Plan by moving for a stay pending appeal in the Bankruptcy Court, in the District Court, and in the Eleventh Circuit Court of Appeals. However, the Eleventh Circuit Court of Appeals declined to review the District Court's requirement of a \$50 million bond as a condition to a stay pending appeal.⁶ The debtors did not file a further motion or petition for stay in this Court as they had announced they would in their motion papers in the Eleventh Circuit.

The debtors failed to post the appeal bond by October 10, 1985, as required by the District Court's Order of October 3, 1985, and the Plan became effective and has been substantially consummated since that time. The opinion of the Eleventh Circuit describes in detail the other pertinent facts of the case.

The Petitioners' statement of the case is inaccurate in numerous respects:

1. The description of the District Court Action (the Petitioners have labelled it the "Lender Liability Suit") brought by the debtors against the Banks is incomplete. The Petitioners omitted reference to a judicial determination that their claims were barred by releases they had signed in 1983 and 1984. *In re Holywell Corp.*, 49 Bankr. 694 (Bankr. S.D. Fla. 1985); App. 8).

2. The Plan provided for the sale of the Miami Center Project with interest on the mortgage debt computed at the pre-default rate rather than at the (higher) default rate.⁷

⁶App. 7.

⁷At page 4 of the Petition, the term "accrued unmatured interest" is inaccurate.

3. The Plan did not provide for the "taking of assets not the property of the debtors' estates, owned by non-filed solvent affiliated creditors." (Petition, page 5). As the Bankruptcy Court, District Court, and Eleventh Circuit have determined, the Plan provided for the exercise by the Trustee of the debtors' option rights over those assets.

4. There has never been any judicial determination that the Bank subordinated insider claims totalling "\$26,123,498" (Petition, page 5), nor is there any basis for that allegation in the record below.

5. The Plan did not pay claims against debtors using the cash of "separate, solvent non-debtor corporations" that were subsidiaries of debtor Holywell Corporation. As the Bankruptcy Court and the District Court found,⁸ the debtor/Petitioners controlled all such funds, and the debtors voluntarily placed the funds under the jurisdiction of the Bankruptcy Court for the payment of creditors. The Eleventh Circuit affirmed the District Court and Bankruptcy Court rulings on that issue. [App. 15]. Subparagraph (f) on page 5 of the Petition brazenly ignores all three rulings.

6. The Plan dealt with the so-called "super-priority loans" and the tax claims. The super-priority loans (really inter-debtor loans) were dealt with in Article II of the Plan⁹ and in an Order reported at 75 Bankr. 793 (Bankr. S.D. Fla. 1987). Tax claims were dealt with in Article III of the Plan.¹⁰ There is no record support for the debtor/Petitioners' bald allegation that unpaid income taxes are "estimated" to be \$20,763,841. (Petition, page 5, subparagraph (g)). At the time

⁸The Opinion is reprinted at App. 15.

⁹App. 35.

¹⁰App. 36.

of confirmation of the Plan, there were no tax claims that were not covered by the Plan. Among other things, the Petitioners failed to disclose or deal with any such claims in the plans and disclosure statements they themselves filed in 1985. The creditors and the Bankruptcy Court rejected those plans.

7. There is no record support for the Petitioners' allegation that the Miami Center Liquidating Trust had \$17 million in cash when the Eleventh Circuit ruled. (Petition, page 9). The Liquidating Trustee has not filed a current or complete accounting recently, but has advised the parties that all available funds will be applied to the pending claims.

8. In footnote 4 on page 10 of the Petition, the Petitioners imply that in a separate appeal brought by the "Miami Center Joint Venture" and its partners, the District Court reversed *in toto* the Confirmation Order. A review of the District Court's ruling demonstrates that the reversal and remand was directed to *only one claim* of the hundreds that were subject to the confirmed Plan. That claim was given a higher priority and a special mechanism for payment [143a], but the balance of the Plan and Confirmation Order remained intact.

9. The Petitioners have selectively quoted certain remarks made by the first Bankruptcy Judge assigned to the cases. [Petition, pages 12, 28; 158a]. The Petitioners have failed to disclose the following related and pertinent facts:

(a) The Petitioners sought and obtained a District Court Order requiring that Bankruptcy Judge to recuse himself, with the result that a second Bankruptcy Judge was appointed to handle the cases from the summer of 1987 to the present.

(b) The Eleventh Circuit refused to issue a writ of mandamus when the Petitioners claimed to have been prejudiced by the initial Bankruptcy Judge's strong feelings about Mr. Gould's behavior in the proceedings [Order of January 27, 1988 in Case No. 87-6105].

(c) Without authorization of any kind by the Eleventh Circuit, Mr. Gould wrote a nine-page letter to each Judge on the panel that issued the original mootness opinion. After a denunciation of the Bankruptcy Judge, Mr. Gould recited the same litany of issues that the District Court had decided against the Petitioners over a year before.¹¹

(d) The Petitioners have repeatedly ignored the Bankruptcy Court's instructions, with the result that contempt proceedings against the Petitioners are pending.¹²

ARGUMENTS AGAINST GRANTING THE WRIT

The Petitioners have listed five "questions presented," but only three "reasons for granting the writ." An analysis of the Petition discloses only two real issues:

1. The propriety of the process by which an appellate bond was required; and
2. Whether the Court of Appeals correctly applied the mootness doctrine to the facts of this case.

These issues are addressed in order.

¹¹35a; reported at 59 Bankr. 340 (S.D. Fla. 1986).

¹²District Court Case No. 88-0628-Civ-Scott.

I.

The Bond Proceedings Were Proper.

The Bankruptcy Court confirmed the Bank's Plan on August 8, 1985. In order to stay the implementation of the Plan, the Petitioners filed a motion for stay pending appeal in the Bankruptcy Court. The Bankruptcy Court heard evidence regarding the amount of the creditors' claims (some \$350 million), the value of the Petitioners' assets, and other matters. Both the Petitioners and the Respondent Bank submitted memoranda of law to the Bankruptcy Court.

The Bankruptcy Court agreed to stay implementation of the Plan pending appeal, but only if the Petitioners posted an appeal bond in the amount of \$140 million.

The Petitioners immediately sought review by the District Court, which promptly conducted a hearing to review additional evidence and memoranda submitted by the parties. The District Court reduced the bond required to \$50 million based upon a determination that the appeal could be briefed and argued on an expedited basis.

The Petitioners immediately sought review of that Order by the Eleventh Circuit. In their motion presented to that Court in October, 1985, the Petitioners requested the Eleventh Circuit to either modify the appeal bond requirements or continue a stay in effect to permit the Petitioners to seek further review to this Court. The Eleventh Circuit denied the motion. [App. 7]. The Petitioners did not seek further review by this Court at that time.

The Petitioners apparently claim that the bond requirement precluded a proper review of the Confirmation Order and Plan on the merits. That argument ignores the record and applicable law.

First, the Petitioners obtained a review on the merits, because the District Court initially denied the Respondent's motion to dismiss the Petitioners' appeal as moot. [35a; reported at 59 Bankr. 340 (S.D. Fla. 1986)]. The District Court correctly rejected each of the Petitioners' arguments on appeal.

Second, the propriety of a stay pending appeal and the size of an appeal bond are intensely factual, discretionary inquiries that are inappropriate for resolution by this Court. This Court does not grant certiorari to review evidence and discuss specified facts, *United States v. Johnston*, 268 U.S. 220, 227 (1925), and this is particularly true where two courts below have concurred in findings of fact. *Rogers v. Lodge*, 458 U.S. 613, 623 (1982); *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949). In the *Graver Tank* case, Justice Jackson stated that this Court's standard of review of concurrent findings by two courts below is "a very obvious and exceptional showing of error." 336 U.S. at 275. That test is even more stringent than the "clearly erroneous" test of Rule 52(a), Federal Rules of Civil Procedure.

Here the stay and bond questions were considered on *three* levels below rather than just two. No error, much less a "very obvious and exceptional" error, has been shown by the Petitioners.

Apparently the Petitioners are urging this Court to require the District Courts and Courts of Appeal to enter a stay pending appeal without a bond whenever the appellant cannot afford to post a bond. In this case, such a ruling would have been a catastrophe for hundreds of creditors holding some \$350 million in claims, most of whom had been waiting for two or more years for payment. If the Petitioners' argument had been accepted below, all of those creditors (including the Bank) would still be unpaid.

The lower courts correctly balanced the mounting interest losses to the creditors against the Petitioners' interests in preserving the *status quo* pending appeal. Literally hundreds of reported opinions addressing the factors a federal court has to balance in evaluating the propriety of a stay and the amount of an appeal bond have analyzed Rule 62, Federal Rules of Civil Procedure. There is no important constitutional or other purpose to be served by this Court's issuance of *certiorari* to review the lower courts' stay and bond proceedings in this case.

II.

The Court of Appeals Correctly Applied the Mootness Doctrine.

Likewise, the application of the mootness doctrine in a given case is particularly fact-driven. Individual decisions turn on the specific details of the confirmed plan of reorganization, the degree to which that plan has been implemented, the positions of the various parties to the proceedings, and the ability of a court to fashion "effective relief."¹³

In this case, the Eleventh Circuit noted that the District Court had made:

¹³This Court has consistently denied *certiorari* jurisdiction where the court below had dismissed the action, in whole or in part, as moot. See, e.g., *In re Ken Davis Holding Co.*, 56 U.S.L.W. 3864 (1988); *Boston Chapter, NAACP v. Beecher*, 749 F.2d 102 (1st Cir. 1984), *cert. denied*, 105 S.Ct. 2154 (1985); *Metropolitan Transp. Auth. v. Federal Energy Regulatory Comm'n*, 796 F.2d 584 (2d Cir. 1986), *cert. denied*, 107 S.Ct. 1286 (1987); *Davis v. Lukhard*, 788 F.2d 973 (4th Cir.), *cert. denied*, 107 S.Ct. 231 (1986); *Seafarers Intenat'l Union v. National Marine Servs., Inc.*, 820 F.2d 148 (5th Cir.), *cert. denied*, 108 S.Ct. 346 (1987); *Fultz v. Rose*, 833 F.2d 1380 (9th Cir. 1987), *cert. denied*, 56 U.S.L.W. 3848 (1988); *Lashley v. First Nat'l Bank*, 825 F.2d 362 (11th Cir. 1987), *cert. denied*, 56 U.S.L.W. 3719 (1988).

[D]etailed findings that the plan was fair, feasible, and that it had been substantially consummated. And it included the finding that it was *legally and practically impossible to unwind the confirmation of the plan or otherwise restore the status quo.*

Miami Center Ltd. Partnership v. Bank of New York, 1a, reported at 838 F.2d 1547, 1554 (11th Cir. 1988) (emphasis added). All of the administrative claims have been paid or reserved; secured claims have been paid in full; class 3 claims have been paid in full; undisputed claims in classes 4 through 6 have been paid in full and funds reserved for disputed claims; several disputed claims have been compromised; and there remain sufficient funds for the satisfaction in full or in part of the Petitioners' claims. *Miami Center*, 838 F.2d at 1552 and 11a. Further, the Miami Center Project was sold almost three years ago to the Bank's designee¹⁴ and is now under new management. Pursuant to the Plan, the Bank advanced millions of dollars in new cash above the mortgage balance, and the Bank released to the Liquidating Trustee over \$30 million in cash collateral. Based on those facts, the Eleventh Circuit instructed the District Court to dismiss the Petitioners' appeal as moot.

The Opinion below is totally consistent with the long line of precedent requiring Article III Courts to decide actual controversies by a judgment which can be carried into effect, and not to give advisory opinions on moot questions. *Mills v. Green*, 159 U.S. 651, 653 (1895). Accordingly, this Court and the federal circuits have consistently and uniformly held that a debtor's failure to obtain a stay pending appeal renders

¹⁴Although not explicitly raised as an issue, Petitioners have suggested that because the Miami Center Project was sold to the Bank's designee, this was not a sale to a "good faith purchaser." The court below, however, held otherwise. *Miami Center*, 838 F.2d at 1554 (citing with approval *In re Bel Air Assocs., Ltd.*, 706 F.2d 301, 305 (10th Cir. 1983) and *Greylock Glen Corp. v. Community Savings Bank*, 656 F.2d 1, 4 (1st Cir. 1981)).

an appeal moot after a plan of reorganization has been substantially implemented.¹⁵ "In this situation, the mootness doctrine promotes an important policy of bankruptcy law—that court-approved reorganizations be able to go forward in reliance on such approval unless a stay has been obtained." *In re Information Dialogues, Inc.*, 662 F.2d 475, 477 (8th Cir. 1981). Moreover, the Ninth Circuit Court of Appeals in *In re Roberts Farms, Inc.*, 652 F.2d 793, 796 (9th Cir. 1981) opined that "[i]n the field of the administration of estates under the bankruptcy laws, the policy of the law strongly supports a requirement that a stay be obtained if review on appeal is not to be foreclosed because of mootness." The implementation of a confirmed plan forever changes the positions and rights of the parties. It is these changes in circumstances and the creditors' reliance on a confirmed plan that make it impossible to fashion a remedy that would restore the interested parties to their former positions.

In light of this general rule and the underlying policy in favor of finality, Petitioners have strained to create a conflict among the circuits or a conflict between the decision of the Eleventh Circuit and the decisions of this Court. The decision below, however, is wholly consistent with the decisions of this Court and of the other federal circuits. There is one harmonious theme throughout the opinions of this Court, the Eleventh Circuit, and the other federal circuits—where it is impossible to fashion a remedy that would restore the

¹⁵Notwithstanding the Petitioners' argument of hardship, the burden of posting a bond and thus obtaining a stay of the District Court's Orders was on the Petitioners. *In re Combined Metals Reduction Co.*, 557 F.2d 179, 190 (9th Cir. 1977). Moreover, Petitioners were not precluded from pursuing other alternatives to stay the execution of the Plan. See, e.g., *Texaco, Inc. v. Pennzoil Co.*, 626 F. Supp. 250 (S.D.N.Y. 1986) (debtor obtained preliminary injunction prohibiting execution of judgment where bond was excessive), *modified on other grounds*, 784 F.2d 1133 (2d Cir.), *reversed on other grounds*, 107 S. Ct. 1519 (1987).

interested parties to their former positions, it would be inequitable to consider the merits of the appeal.

The Petitioners have erroneously relied on the Ninth Circuit Court of Appeals' decision in *In re Sun Valley Ranches, Inc.*, 823 F.2d 1373 (9th Cir. 1987) in their attempt to create a conflict among the circuits. The Petitioners have misconstrued the holding of that court by narrowly focusing on the language of the *Sun Valley* court that an exception to the general rule of mootness exists where real property is sold to a creditor who is a party to the appeal. *Id.* at 1375. This myopic reading of the *Sun Valley* decision does violence to the principles of mootness and finality.

A careful review of the *Sun Valley* decision, other decisions of the Ninth Circuit, and decisions of the other federal circuits indicates that a proper reading of *Sun Valley* is more in line with the established principles of mootness. The "narrow exception" set forth by the Ninth Circuit in *Sun Valley* is really no more than a corollary of the general rule that where there are changes in circumstances which make it impossible to fashion a remedy that would restore the interested parties to their former positions, it would be inequitable to consider the merits of the appeal.

Consequently, it is noteworthy that in *Sun Valley*, the creditor's purchase of the real property was subject to the debtor's statutory right of redemption. This additional factor is decisive. The Ninth Circuit in *Sun Valley* did not establish a *per se* rule that an exception exists where the real property is sold to a creditor who is a party to the appeal. Instead, the Ninth Circuit followed the general rule that where it is possible to fashion an effective remedy, an Article III Court will consider the merits of the appeal. The possibility of fashioning such a remedy existed in *Sun Valley*, because the creditor's purchase was subject to the debtor's statutory right of redemption. This statutory right of redemption is not a

factor in this case, nor was it a factor in the decisions relied upon by the Court below in holding that Petitioners' appeal should be dismissed as moot.

The court in *Sun Valley* plainly recognized the limitations of its holding:

This exception to the rule is especially appropriate here, where the foreclosure sale is subject to statutory rights of redemption. Where the assets sold were shares of stock, we said that "the fact that the purchaser is a party to [an] appeal does not change the applicability of the mootness rule."

Id. (quoting *Algeran, Inc. v. Advance Ross Corp.*, 759 F.2d 1421, 1424 (9th Cir. 1985)). Therefore, the fact that the purchaser is a party to the appeal is no more than a factor to be considered in determining whether it is possible to fashion a remedy.

This limitation is evident from the Ninth Circuit's citation with approval in *Algeran* of the Eleventh Circuit's decision in *In re Sewanee Land, Coal & Cattle, Inc.*, 735 F.2d 1294, 1296 (11th Cir. 1984). *Algeran*, 759 F.2d at 1424. The *Algeran* court specifically cites *Sewanee* as support for "the fact that the purchaser is a party to the appeal does not change the applicability of the mootness rule."¹⁶ *Id.* The Ninth Circuit's statement in *Sun Valley* that it would not follow the position of the Eleventh Circuit is based upon a stated perception that the Eleventh Circuit has adopted a *per se* refusal to consider the fact that the purchaser is a party to the appeal. The Eleventh Circuit, in *Sewanee*, however,

¹⁶The Ninth Circuit in *Worcester v. Rosner*, 811 F.2d 1224, 1228 (9th Cir. 1987) noted that in *Algeran* the Ninth Circuit adopted "the Eleventh Circuit's approach as to when a stay pending appeal is required in order to prevent mootness." This is hardly the language of a court disagreeing with one of its sister courts of appeals.

did not articulate such a *per se* rule. Rather, the court, in *Sewanee*, recognized that "[i]n some situations, failure to obtain a stay pending appeal will render the case moot." *Sewanee*, 735 F.2d at 1295 (emphasis added). Thus, despite Petitioners' assertion, the Eleventh Circuit has not adopted a *per se* application of the mootness doctrine, and an "irreconcilable conflict" does not exist as a result of the Ninth Circuit's decision in *Sun Valley*.

For the same reasons, the Ninth Circuit's decision in *In re Technical Knockout Graphics, Inc.*, 833 F.2d 797 (9th Cir. 1987) does not present a conflict. Notwithstanding the Petitioners' assertion, that court did not base its holding on the fact that all of the essential parties were before it. Rather, the basis for that court's holding is that despite the confirmation of the plan, it was still possible to fashion a remedy that would restore the interested parties to their former positions. In that case, a remedy was available because the only concern was the allocation of funds to pay differing tax liabilities to the IRS. That decision is consistent with the Eleventh Circuit opinion in this matter.

Moreover, contrary to Petitioners' assertion, the Eleventh Circuit relied upon more than its finding of "substantial consummation" for its ruling on mootness. The Eleventh Circuit cited *In re AOV Industries, Inc.*, 792 F.2d 1140 (D.C. Cir. 1986), *In re Roberts Farms, Inc.*, 652 F.2d 793 (9th Cir. 1981), and *In re Combined Metals Reduction Co.*, 557 F.2d 179 (9th Cir. 1977), in analyzing the factors to be considered in determining whether an appeal is moot.

These cases tell us that in considering whether in a reorganization case matters not directly related to sales are within the mootness rule, the court may consider the virtues of finality, the passage of time, whether the plan has been implemented and

whether it has been substantially consummated, and whether there has been a comprehensive change in circumstances.

Miami Center, 838 F.2d at 1555. All of these elements are present here.

Consequently, it is clear that the Eleventh Circuit has not adopted a *per se* approach as Petitioners suggest. Rather, the Eleventh Circuit considered substantial consummation as but another factual element for the reviewing court to consider in determining whether it can fashion a remedy. As the Eleventh Circuit held in this case, it is impossible to return the Plan proponent to its pre-confirmation status. Accordingly, the Eleventh Circuit's decision with regards to substantial consummation is consistent with the decisions of the other federal circuits.

Likewise, the appellate decisions in *AOV* and *Combined Metals* cited by Petitioners, and in *Roberts*,¹⁷ are consistent with the Court's decision below. In *AOV*, the court cited *Combined Metals* for the proposition that even where "much of the debtor's property has been liquidated, and many of the creditors have been paid, the plan still controls the actions of the trustee." *AOV*, 792 F.2d at 1148 (quoting *Combined Metals*, 557 F.2d at 194). The *AOV* Court then contrasted the holding in *Combined Metals* with that in *Roberts*, and observed that the *Roberts* court had factually distinguished *Combined Metals*.

In distinguishing *Combined Metals*, the Ninth Circuit in *Roberts* observed:

In this case the property transactions do not stand independently and apart from the plan of

¹⁷A discussion of *Roberts* is conspicuously absent from the Petition.

arrangement. Here the many intricate and involved transactions . . . were contemplated by the plan of arrangement . . . and stand *solely* upon the order confirming the plan of arrangement for court approval and confirmation of the transactions.

Roberts, 652 F.2d at 797. The Court in *AOV* thus opined that "*Roberts Farms* does not stand for a bright-line rule that 'substantial consummation' forecloses any possibility of relief from court- and creditor-approved reorganization plans." *AOV*, 792 F.2d at 1148. The Bank agrees with this interpretation, and nothing in the opinion of the Eleventh Circuit below is at odds with this reading of *Roberts*. The District Court specifically found that it would be "legally and practically impossible to unwind the confirmation of the plan or otherwise restore the status quo." *Miami Center*, 838 F.2d at 1554.

The concern in *Roberts* is the same which faced the appellate court below and which is unchanged by the decision in *AOV*:

Are we not quite patently faced with a situation where the plan of arrangement has been so far implemented that it is impossible to fashion effective relief for all concerned? Certainly, *reversal of the order confirming the plan of arrangement*, which *would knock the props out from under the authorization for every transaction that has taken place, would do nothing other than create an unmanageable, uncontrollable situation for the Bankruptcy Court.*

Roberts, 652 F.2d at 797 (emphasis added). Moreover, the District Court in *In re Revere Copper & Brass, Inc.*, 78 Bankr. 17, 22 (S.D.N.Y. 1987) noted that the appeal in *AOV* "was extremely circumscribed in scope."

Similarly, the Fourth Circuit's decision in *Central States, Southeast and Southwest Areas Pension Fund. v. Central Transport, Inc.*, 841 F.2d 92, 96 (4th Cir. 1988) is not in conflict with the decision of the Eleventh Circuit. The court's observation in *Central States*, as quoted by Petitioners, that substantial consummation does not immunize a plan from appellate review, is consistent with the other cases and with this case. In fact, the next sentence in the *Central States* opinion clearly reflects the same uniform and consistent articulation of the general rule:

On the other hand, dismissal of the appeal on mootness grounds is required when implementation of the plan has created, extinguished or modified rights of persons not before the court, to such an extent that effective judicial relief is no longer practically available.

Id.

Likewise, the Tenth Circuit Court of Appeals' decision in *In re King Resources Co.*, 651 F.2d 1326 (10th Cir. 1980) is also consistent with the decision of the Eleventh Circuit and the decisions of the other federal circuits. The *King Resources* court held that if the "effect of reversal on appeal would be to order the impossible, we would not address the merits of the appeal." *Id.* at 1332. Unlike the record before the court below, the court in *King Resources* was unable to conclude on the record before it that the claim of substantial consummation had been clearly established. *Id.* Nevertheless, the court in *King Resources* was unconcerned with the question of mootness, because it ultimately affirmed the district court's decision. *Id.* at 1332, 1341.

The Petitioners have also attempted to suggest that a conflict somehow exists as a result of a line of cases holding

that a satisfaction of a judgment does not moot an appeal.¹⁸ These cases, however, are inapposite and indicate no deviation from the general rule. The crucial inquiry is whether it is possible to fashion a remedy in equity that would restore the interested parties to their former positions.

Obviously, in the *Latham* case, which involved a single asset bankruptcy, the court had no difficulty in returning the parties to their prior position. Likewise, the decision in *Cahill*, which involved an award of money damages, and *Mancusi*, which involved the sentencing of a criminal defendant, pose no difficulty in restoring the parties to their former position. This is in stark contrast with the facts in this case where it is "legally and practically impossible to unwind the confirmation of the plan or otherwise restore the status quo." *Miami Center*, 838 F.2d at 1554.

Finally, the Petitioners argue that a due process violation vitiates the mootness doctrine. The Bank, of course, agrees that Petitioners are entitled to the protections afforded by both the substantive and procedural requirements of the due process clause of the Fifth Amendment. The factual circumstances in the cases cited by the Petitioners as support, however, are not even remotely close to the facts in this case. In both *In re Center Wholesale, Inc.*, 759 F.2d 1440 (9th Cir. 1985) and *In re Blumer*, 66 Bankr. 109 (9th Cir. B.A.P. 1986), there was an issue regarding the sufficiency of notice. Obviously, that concern is not present here. Rather, both the Bankruptcy Court and the District Court have considered the merits of the Petitioners' objections at length and rejected them.

¹⁸See Petitioner's discussion of *In re Latham*, 823 F.2d 108 (5th Cir. 1987) and *Cahill v. New York, New Haven & Hartford R. Co.*, 351 U.S. 183 (1956) (Petition, page 18) and *Mancusi v. Stubbs*, 408 U.S. 204 (1972) (Petition, page 22).

This Court has acted consistently to limit and control the burgeoning workload of the federal court system. The mootness doctrine in bankruptcy cases is a significant element of that effort. Bankruptcy cases already have an additional level of review in the federal system. Debtor/appellants like the Petitioners here are able to obtain a thorough review of any lower court order (a) granting or denying a stay pending appeal or (b) establishing the amount of an appeal bond. In this case, the Petitioners sought review of such orders in 1985 through the level of the Court of Appeals, but abandoned their prior plan to seek further review of the stay order by this Court. For the sake of creditors, the litigants, and the federal system, a confirmed bankruptcy plan of reorganization must not be kept under an appellate sword of Damocles for the entire duration of the appellate process. If the debtor/appellants fail to post a bond as required, the parties should be allowed to consummate the plan and change positions in reliance upon the law of that case at that time.

To hold otherwise, as the Petitioners apparently urge, is to paralyze the ability of the bankruptcy courts to oversee and conclude reorganization cases.

CONCLUSION

The debtor/Petitioners have initiated over 20 appeals to the District Court and four review proceedings in the Eleventh Circuit over the past four years. Every court to consider the Petitioners' eight objections to the confirmed Plan [Petition, pages 13-15] has rejected these objections. The Respondent Bank has not sought to "avoid the merits" as alleged by the Petitioners. Indeed, the District Court affirmed the underlying Bankruptcy Court rulings on the merits over two years ago.

The Petitioners want this Court to sanction a stay pending appeal without a bond, in effect re-writing Rule 62 of the Federal Rules of Civil Procedure. The Petitioners also want this Court to review the fact-based mootness decision reached by a lower court.

Neither issue is appropriate for review by this Court. Both issues involve the application of well-established rules of law to specific questions of fact. Neither issue involves the abridgement of a constitutional right or a conflict between federal circuits. It is respectfully submitted that the Petition should be denied.

Respectfully submitted,
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By:

15/
Vance E. Salter

CERTIFICATE OF SERVICE

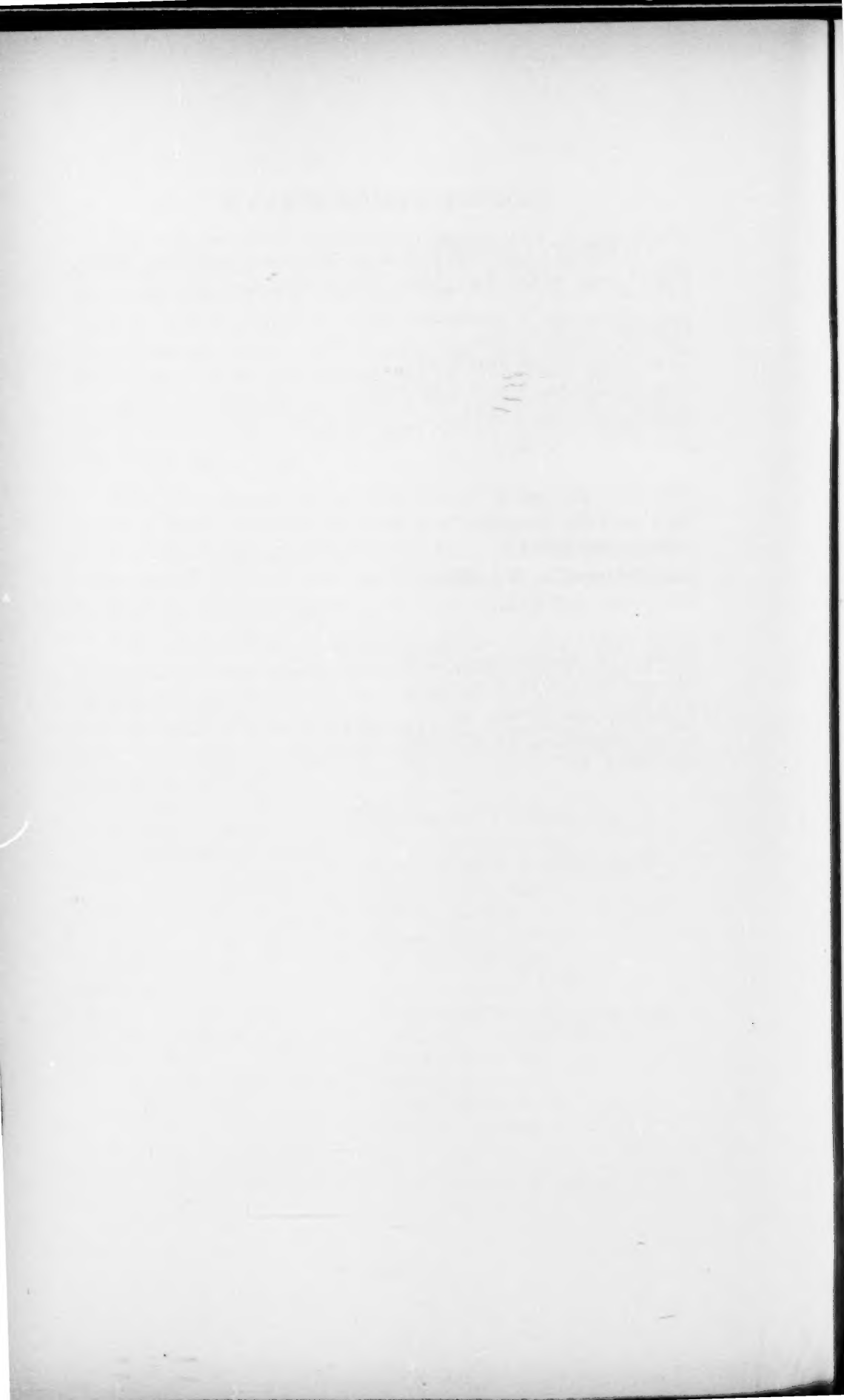
I HEREBY CERTIFY that on the 5th day of July, 1988,
a true copy of the foregoing was mailed to:

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/s/
Vance E. Salter



Appendix



INDEX TO APPENDIX

- App. 1 *Holywell Corp. v. Smith*, Case No. 87-5195 (Per Curiam affirmance by Eleventh Circuit Court of Appeals)
- App. 3 *The Bank of New York v. Gould*, Adv. No. 85-0160-BKC-TCB-A (Judgement Determining Amount, Validity and Extent of Liens of The Bank of New York)
- App. 7 *Miami Center Ltd. Partnership v. The Bank of New York*, Case No. 85-5887 (Order on motion to dismiss for lack of prosecution)
- App. 8 *The Bank of New York v. Gould*, Bkcty. No. 84-01590-BKC-TCB, Adv. No. 85-0160-BKC-TCB (Memorandum decision on debtors' motion for stay)
- App. 15 *Holywell Corp. v. The Bank of New York*, Case No. 86-0848-Civ-Ryskamp (Order affirming decision of bankruptcy court)
- App. 25 *In re Holywell Corp.*, Bkcty. Ct. Case Nos. 84-01590-BKC-TCB through 84-01594-BKC-TCB, Amended Consolidated Plan of Reorganization Proposed by The Bank of New York
- App. 53 *In re Holywell Corp.*, Bkcty. Ct. Case Nos. 84-01590-BKC-TCB through 84-01594-BKC-TCB, Stipulation and Order Respecting Implementation of Amended Consolidated Plan of Reorganization Proposed by The Bank of New York

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- App. 58 *In re Holywell Corp.*, Bkcty. Ct. Case Nos. 84-01590-BKC-TCB through 84-01594-BKC-TCB, Addendum to Stipulation and Order Respecting Implementation of Amended Consolidated Plan of Reorganization Proposed by The Bank of New York
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- App. 65 *In re Holywell Corp.*, Bkcty. Ct. Case Nos. 84-01590-BKC-TCB through 84-01594-BKC-TCB, Notice of Filing of Second Amendment to the Amended Consolidated Plan Proposed by The Bank of New York
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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-5195

D.C. Docket No. 86-0848

IN RE: HOLYWELL CORPORATION and
THEODORE B. GOULD,
Debtors.

HOLYWELL CORPORATION and
THEODORE B. GOULD,
Plaintiffs-Appellants,

versus

FRED STANTON SMITH, Liquidating
Trustee, and BANK OF NEW YORK,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(March 18, 1988)

Before VANCE and ANDERSON, Circuit Judges, and
BROWN*, Senior Circuit Judge.

PER CURIAM:

The district court found that appellants were equitably estopped with respect to their claim to the proceeds of Twin Development Corporation's assets. We find no error in the

*Honorable John R. Brown, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

district court's analysis, and the record abundantly supports the district court's findings. Appellants' other claims on appeal are frivolous.

AFFIRMED.¹

¹The motion of appellee, Bank of New York, to dismiss the appeal as moot is **DENIED**.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

CHAPTER 11

CASE NOS.

84-01590-BKC-TCB

84-01591-BKC-TCB

84-01592-BKC-TCB

84-01593-BKC-TCB

84-01594-BKC-TCB

ADV. NO. 85-0160-BKC-TCB-A

IN RE: HOLYWELL CORPORATION, et al.,

Debtors.

THE BANK OF NEW YORK,
a New York banking corporation,

Plaintiff,

vs.

THEODORE B. GOULD, individually, as partner of CHOPIN ASSOCIATES, a Florida general partnership, and as a general partner of MIAMI CENTER LIMITED PARTNERSHIP, a Florida limited partnership; MIAMI CENTER CORPORATION, a Florida corporation, as partner of CHOPIN ASSOCIATES, and as general partner of MIAMI CENTER LIMITED PARTNERSHIP; and HOLYWELL CORPORATION, a Delaware corporation,

Defendants.

**JUDGMENT DETERMINING AMOUNT,
VALIDITY, AND EXTENT OF LIENS
OF THE BANK OF NEW YORK**

THIS CAUSE came to be heard on March 14, 1985 upon the Complaint of The Bank of New York (the "Bank") to determine the amount, validity, and extent of the Bank's mortgage liens. Having reviewed the pleadings and heard argument of counsel, it is hereby ORDERED and ADJUDGED that:

1. This Court has jurisdiction to hear and determine this cause pursuant to 28 U.S.C. §§157(B)(2)(K) and 1334, and has jurisdiction over the parties.

2. The Bank is a New York banking corporation located in New York, New York, and is a secured creditor of the Debtors as set forth in Proofs of Claim filed on December 20, 1984 in case numbers 84-01590-BKC-TCB, 84-01591-BKC-TCB, 84-01592-BKC-TCB, 84-01593-BKC-TCB and 84-01594-BKC-TCB.

3. Defendants, Theodore B. Gould ("Gould") and Miami Center Corporation, a Florida corporation ("MCC"), are the sole partners of defendant Chopin Associates, a Florida general partnership ("Chopin") and are the sole general partners of defendant Miami Center Limited Partnership, a Florida limited partnership ("MCLP").

4. Defendant, Holywell Corporation ("Holywell"), is a Delaware corporation with its principal place of business in Arlington, Virginia.

5. Gould, MCC, Chopin, MCLP and Holywell are the Debtors in the above-styled proceedings, having filed voluntary petitions in this Court under Chapter 11 of the Bankruptcy Code on August 22, 1984.

6. Chopin is the fee owner and MCLP is the ground lessee and the owner of all improvements and personal property on the real estate located in Miami, Dade County, Florida ("Miami Center Phase I"), as described in the loan documents attached to the Bank's Complaint in this action.

7. The due execution, delivery, recording, and authenticity of the notes, mortgages, and other loan documents is not in dispute.

8. The Bank advanced to the Debtors under the terms of the notes and mortgages the sum of \$196,711,481.58, all of which is secured by the mortgages.

9. The Bank notified the Debtors by letter that the loans were in default at all times after January 31, 1984.

10. Accrued interest on the loans, determined by the Bank at the "contract" (good standing) rate, to March 14, 1985 is \$33,103,184.24, and is secured by the Bank's mortgages. Based on a Prime Rate of 10.5% per annum, interest will accrue at \$64,171.66 per day from March 14, 1985. Any change in the prime rate (whether up or down) will affect that daily interest figure.

11. Additional accrued interest on the loans, determined by the Bank, commenced February 1, 1984. That additional default interest of \$4,528,077.11 is payable to March 14, 1985, and is secured by the loan documents. Based on a prime rate of 10.5% such default interest will accrue in the additional amount of \$11,148.50 per day under the loan documents for each day from March 14, 1985 (for a total daily sum of \$75,320.16). Any change in the prime rate (whether up or down) will affect that daily interest figure.

12. The Bank claims additional amounts under the liens of the mortgages for pre-petition legal and loan expenses,

totalling \$831,563.72. The Court reserves ruling on whether all or some part of such legal and loan expenses should be added to the mortgage lien.

13. The lien of The Bank of New York in and to the Debtors' real and personal property identified in the loan documents as against the Debtors is superior to any other claim or interest of the Debtors in and to said real and personal property.

14. This Court will retain jurisdiction to grant such further relief as may be necessary and proper.

15. The Court finds and decides that the total lien of the Bank (including default interest from February 1, 1984) is \$234,342,742.93 to March 14, 1985, plus per diem interest from March 14, 1985, at the rate of \$75,320.16 per day.

16. This Final Judgment is subject to the Court's Order, dated March 20, 1985, respecting the scope of the 1983 and 1984 releases executed by the Debtors.

DONE and ORDERED in Chambers at Miami, Florida, this 20th day of March, 1985.

/s/ Thomas C. Britton

UNITED STATES BANKRUPTCY
JUDGE

cc: S. Harvey Ziegler, Esq.
Vance E. Salter, Esq.
Fred H. Kent, Jr., Esq.
Irving M. Wolff, Esq.

[FILED OCT 9, 1985]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-5887

MIAMI CENTER LIMITED PARTNERSHIP, MIAMI
CENTER CORPORATION, THEODORE B. GOULD,
CHOPIN ASSOCIATES, HOLYWELL CORPORATION,
Plaintiffs-Appellants,

versus

BANK OF NEW YORK,
Defendant-Appellee.

Appeal from the United States District Court for the
Southern District of Florida

Before TJOFLAT, VANCE and KRAVITCH, Circuit Judges.

BY THE COURT:

Appellee's motion to dismiss appeal for lack of jurisdiction
is GRANTED.

In re HOLYWELL CORP.,

Debtor(s).

The BANK OF NEW YORK,

Plaintiff,

v.

Theodore GOULD, et al.,

Defendant.

Bankruptcy No. 84-01590-BKC-TCB.

Adv. No. 85-0160-BKC-TCB.

United States Bankruptcy Court,
S.D. Florida.

March 20, 1985.

Debtors' largest secured creditor sought determination of amount, validity and priority of lien. Lien was disputed by debtors through two counts which asserted breaches of contract, one count which alleged fraud, another count which alleged criminal usury, and fifth count which asserted civil Racketeer Influenced and Corrupt Organization Act claim. The Bankruptcy Court, Thomas C. Britton, J., held that: (1) fraud, criminal usury and RICO civil claim were barred by releases even though claims did not exist at time releases were executed, and (2) it was legal to bar by release defenses of fraud, criminal usury, and RICO civil claim.

Debtors' motion for stay denied.

1. Release —25

Effect of release, executed in Florida, is to be determined by resort to Florida law.

2. Release —33

Under Florida law, releases signed by debtor as to fraud, criminal usury, and Racketeer Influenced in Corrupt Organizations Act [18 U.S.C.A. § 1961 et seq.] civil claim were not invalid even though claims did not exist at time releases were executed.

3. Release —33

Party may bar by release defenses to lien of fraud, criminal usury, and Racketeer Influenced and Corrupt Organization Act [18 U.S.C.A. § 1961 et seq.] civil claims.

4. Usury —104

Although usury violates statute and is contrary to public policy and, therefore, is illegal and unenforceable as between parties, party may lawfully waive and estop himself from asserting defense based upon usury and may do so by executing and delivering release.

5. Release —33

Where debtors explicitly contracted to release future as well as existing claims and unknown as well as known claims, debtors' fraud, criminal usury, Racketeer Influenced and Corrupt Organization Act [18 U.S.C.A. § 1961 et seq.] civil claim and two contract claims were barred as defenses to creditor's lien.

Barry Davidson, Miami, Fla., for plaintiff.

Fred H. Kent, Jr., Jacksonville, Fla., for defendants.

S. Harvey Ziegler, Miami Beach, Fla., Thomas F. Noone, New York City, for Bank of New York.

MEMORANDUM DECISION

THOMAS C. BRITTON, Bankruptcy Judge.

The debtors' largest secured creditor seeks a determination of the amount, validity and priority of its lien. The matter was heard on March 14.

The plaintiff's lien is disputed by the debtors through two counts which assert breaches of contract, one count which alleges fraud, another count which alleges criminal usury, and a fifth count which asserts a civil RICO claim.

Shortly after this adversary complaint was filed by the plaintiff/creditor, the debtors amended their complaint then pending in the District Court against the plaintiff/creditor by adding the five counts identified. In this action, the debtors have requested a stay by this court until the District Court can hear and determine the five counts in question after a jury trial.

These chapter 11 debtors have presented a plan for reorganization and the plaintiff/creditor has presented an alternative plan. Both plans are scheduled to be considered by confirmation, after a vote by the creditors on April 29. The plaintiff's claim exceeds \$225 million and accrues interest at the rate of \$2.4 million per month. The parties agree that every effort should be made to avoid any delay in the consideration of the pending plans and in the disposition of the dispute before them.

I am convinced that this court can best serve the parties, the remaining creditors who are not parties to this action, and the District Court by hearing and deciding now the

plaintiff/creditor's contention that the five defenses raised by the debtors are barred by releases executed by the debtors in June 1983 and again in June 1984.

The release of June 23, 1983 is in the form of a letter executed by the debtors Gould, Holywell Corporation, Miami Center, Ltd., Partnership and Chopin Associates in consideration of continued financing by the plaintiff bank. It provides that:

"The undersigned release and discharge the Bank, its participants, successors and assigns, for all time, from any claims of any nature which the undersigned ever had, now or hereafter can, shall or may have in connection with or arising out of (i) the Loans or (ii) the Loan Documents."

The release dated June 11, 1984 is executed by the same four parties together with the debtor Miami Center Corporation. It is in consideration of the bank's forbearance of acknowledged defaults as well as additional financing. It provides:

"Chopin Miami Center, Holywell, MCC and Gould each jointly and severally hereby release and discharge the Bank, its participants, successors and assigns for all time from any claims of any nature, whether known or unknown, which Chopin, Miami Center, Holywell, MCC or Gould ever had, now or hereafter can, shall or may have in connection with, or arising out of, or otherwise relating to the Loans or the Loan Documents."

The execution and delivery of these releases is conceded. The debtors do not claim any fraud or other irregularity in the inducement or execution of either release nor do they assert any other ground for avoidance of either release. It

is the debtors' only contention that three of their five defenses: the fraud, criminal usury and RICO civil claim (or at least some of these three defenses) did not exist at the time these releases were executed and, therefore, are not barred by the releases and, alternatively, it is not legally possible for a party to bar by release defenses of the nature asserted in these three counts. I find no merit in either contention.

[1] The parties agree that the effect of these releases, which were executed in Florida, is to be determined by resort to Florida law. In *Gunn Plumbing Inc. v. Dania Bank*, 252 So.2d 1, 4 (Fla. 1971), the Florida Supreme Court held that the waiver by defendants of the defense of usury in a prior action constituted an estoppel from raising the defense of usury to a second renewal note. The court noted that usury is a purely personal defense which may be waived and that:

"it has no especial claims upon the indulgence and favor of the court, but must be disposed of upon the same principles and in the same manner as other defenses."

The court also said:

"This Court is committed to the rule that it not only approves but favors stipulations and agreements on the part of litigants and counsel designed to simplify, shorten or settle litigation and save costs to the parties, and the time of the court, and when such stipulation or agreements are entered into between parties litigant or their counsel, the same should be enforced by the court, unless good cause is shown to the contrary."

[2] Although the *Gunn* case involved a stipulation in a pending case rather than a release executed by a possible prospective defendant, I am aware of no basis for considering

that a different rule would apply to a release. Similarly, I see no basis to enforce the release of the defense of usury but refuse to enforce the release of either a fraud or RICO civil claim merely because fraud and RICO claims, like usury, are based upon conduct which is contrary to public policy and is prohibited by statute.

Munilla v. Perez-Cobo, 335 So.2d 584 (Fla. Dist. Ct. App. 1976) follows and applies *Gunn*.

In *Weingart v. Allen & O'Hara*, 654 F.2d 1096, 1103 (5th Cir. 1981), the court applied Florida law, saying:

"The district court was correct in determining that both of plaintiffs' claims, fraud and breach of contract, with respect to the Hollows and Boot Lake subcontracts, were released, and thus did not err in granting judgment n.o.v. on that basis."

[3] In *Ingram Corporation v. J. Ray McDermott & Co., Inc.*, 698 F.2d 1295, 1323, n. 30 (5th Cir. 1983), the District Court had denied summary judgment in RICO claims and state and federal antitrust claims, where summary judgment had been sought by defendant based upon releases. The Court reversed and remanded holding that the antitrust and RICO claims are barred by releases unless the release is avoidable on equitable grounds. I see no reason why the same result should not be reached in the application of Florida law.

[4] The debtors have relied upon *Schaal v. Race*, 135 So.2d 252 (Fla. Dist. Ct. App. 1961), which appears to me to be completely irrelevant to the issues before me, *Bond v. Koscot Interplanetary, Inc.*, 246 So.2d 631 (Fla. Dist. Ct. App. 1971) and *Frye v. Taylor*, 263 So.2d 835 (Fla. Dist. Ct. App. 1972). The last two cases each hold that agreements which violate statutes or are contrary to public policy are illegal, void and unenforceable as between parties. Neither case involved a

release or other waiver of a defense asserting illegality. It appears clear to me that although usury, for example, violates a statute and is contrary to public policy and, therefore, is illegal and unenforceable as between the parties, a party may lawfully waive and estop himself from asserting a defense based upon usury and that he may do so by executing and delivering a release. That appears to be the effect of the holding in *Gunn*. Neither of these cases undercuts that conclusion.

[5] The two releases executed by the debtors each explicitly contracted to release future as well as existing claims and unknown as well as known claims. I am aware of no Florida decision declaring such releases unenforceable, and the debtors have presented no such authority.

I find, therefore, that each of the five defenses asserted by the debtors is barred by the releases executed by these debtors. There is, therefore, no useful purpose to be served by the stay of this adversary proceeding pending determination by the District Court of the action before it. I fully recognize, of course, and take comfort from the fact that the determination of this court is subject to review by the District Court.

The debtors' motion for stay is denied. The parties have agreed that they can present a judgment fixing the exact amount of the debt owed to the plaintiff by each debtor and that plaintiff's lien has been duly perfected and is applicable to collateral which is undisputed. The parties are directed to submit such a judgment which will incorporate this court's determination that the plaintiff's lien is valid and enjoys a first priority. Costs, if any, may be taxed on motion.

[FILED FEB 20, 1987]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 86-0848-CIV-RYSKAMP

HOLYWELL CORPORATION, and
THEODORE B. GOULD,

Debtor/Appellants,

v.

THE BANK OF NEW YORK AND
FRED STANTON SMITH, AS LIQUIDATING TRUSTEE,

Appellees.

ORDER AFFIRMING DECISION OF
THE BANKRUPTCY COURT

THIS CAUSE is before the court on appeal from a final order entered by the United States Bankruptcy Court for the Southern District of Florida.

I. Parties and Facts

The appellants are two of five debtors involved in chapter eleven bankruptcy proceedings in the bankruptcy court below.¹ These proceedings were apparently precipitated by

¹The three debtors that did not appeal are Miami Center Corporation, a wholly owned subsidiary of Holywell, Chopin Associates, a partnership of which Theodore B. Gould and Miami Center Corporation are the sole general partners, and Miami Center Limited Partnership, a limited partnership with Gould and the Miami Center Corporation acting as general partners.

the inadequate financing of a construction project called the "Miami Center Project", which the debtors had attempted to finance in part through a loan from the Bank of New York (hereinafter "Bank"). Appellant and debtor, Theodore B. Gould (hereinafter "Gould"), is the sole stockholder and president of appellant/debtor Holywell Corporation (hereinafter "Holywell"), which is the parent company of Twin Development Corporation (hereinafter "Twin"). Gould is also the president and one of the directors of Twin.

On June 23, 1983, Holywell pledged, *inter alia*, Twin's stock to secure Holywell's guaranty of construction loans made to Holywell by the Bank. Approximately seven months later, Holywell and the other debtors defaulted on their obligations to the Bank resulting in the filing of bankruptcy petitions by the debtors. The debtors default entitled the Bank to the unfettered right to plenary ownership of Twin's stock. Thereafter, on October 1, 1984, Holywell and Gould moved the bankruptcy court to authorize and approve the sale of certain specified real and personal property owned by Twin and four limited partnerships, all of which are controlled by Gould and Holywell. The bankruptcy court entered an order approving and authorizing Holywell and Gould to consummate the sale of the "Washington properties".² Subsequently, the bankruptcy court directed Holywell to cause Twin to deposit into a segregated account, any funds payable to Twin from the sale of the Washington properties, and adjudged that the Bank had a first lien on the net proceeds owed Holywell, Gould, and Twin, from the sale of that property.

²The "Washington properties" refer to three office buildings located in the Washington, D.C., locality, which became a part of the assets of Twin, and four limited partnerships, all of which are owned by Gould and Holywell. Twin received its portion of the one hundred twelve million dollars in cash proceeds from the sale of the Washington properties, which sum is presently at issue on this appeal.

After the sale of the Washington properties, the bankruptcy court adopted the plan of reorganization submitted by the Bank. The Bank's plan consisted of the appointment of a liquidating trustee, who would be empowered to sell the Miami Center Project to the Bank, in lieu of the Bank's claims against the debtors. That plan was then affirmed on appeal by the district court in a thorough and detailed analysis by Judge Aronovitz (see case no. 85-3225-Civ-Aronovitz).

Finally, on January 28, 1986, the bankruptcy court entered an order granting the liquidating trustee, under the plan of reorganization, sole and complete authority over the Washington properties proceeds segregated in a bank account in Twin's name. This order was necessitated by Gould's contention that the liquidating trustee was without authority to effect the assets of Twin. From this order, Gould and Holywell appeal.

II. Jurisdiction and Mootness

The subject matter jurisdiction of this court has been invoked by the appellants pursuant to 28 U.S.C. §158, which grants district courts of the United States jurisdiction to hear appeals from final orders of bankruptcy judges in cases brought under title eleven of the United States Code. At the threshold, the appellees urge this court to decline the exercise of jurisdiction over this appeal, for they contend this appeal is moot. The appellees stress two points relating to the mootness of this appeal: First, they contend that the appellant's neglect in procuring an order staying the implementation of the plan of reorganization, submitted by the Bank and accepted by the bankruptcy court, is fatal to this appeal; second, the appellees maintain that the plan of reorganization has been "substantially consummated", as that phrase is defined in 11 U.S.C. §1101(2), and this appeal

should be dismissed as moot, since the liquidating trustee's funds have been depleted.

Respecting the appellees first contention on mootness, this court is unwilling to apply a per se rule which demands that a party secure a stay of a bankruptcy order to ensure its appealability. "Determinations of mootness . . . cannot be cabined by inflexible, formalistic rules, but instead require a case-by-case judgment regarding the feasibility or futility of effective relief should a litigant prevail". *In re AOV Industries, Inc., v. Hawley Fuel Coalmart, Inc.*, 792 F.2d 1140, 1147-48 (D.C. Cir. 1986). Accordingly, the inquiry on mootness should focus on the feasibility or impossibility of effective relief to the appellants, in light of the appellees assertion that the plan of reorganization has been consummated. Although it appears that the plan of reorganization has been implemented to a large extent, and the precise portion of Twin's proceeds from the sale of the Washington properties may not be identifiable from other funds in the debtors' estates, this court nevertheless concludes that effective relief is possible. This conclusion derives from the most recent report submitted by the liquidating trustee to the bankruptcy court indicating a surplus in excess of two million dollars in the debtors' estates. If this court were to conclude that the bankruptcy court erred in ordering that the liquidating trustee be entrusted with custody of Twin's funds, it is clear that the power to effect the surplusage in the debtors' estates would lie within this court's discretion. Consequently, this court rules that the instant appeal is not moot, and the exercise of jurisdiction over this appeal pursuant to 28 U.S.C. §158 is proper.

III. Standard of Review

Appellate review of the bankruptcy court's order granting the liquidating trustee complete custody of Twin's funds is guided by two standards. First, as to findings of fact made

by the bankruptcy court, they shall be affirmed unless it is demonstrated that they are clearly erroneous. Bankruptcy Rule 8013. Contrarily, the resolution of legal issues by the court below are subject to *de novo* review by this court. See *In re Matter of Butkin Bros., Inc.*, 757 F.2d 1573 (5th Cir. 1985).

IV. Equitable Estoppel

This court is cognizant of the equitable nature of bankruptcy jurisdiction and the pervading invocation of equitable principles in the exercise thereof. *Marin v. England*, 385 U.S. 99, 87 S.Ct. 274, 17 L.Ed.2d 197 (1966). In the instant appeal, it appears that the doctrine of equitable estoppel, a widely used equity concept in bankruptcy, as well as in other areas of the law, should be imposed against the appellant in affirming the order of the bankruptcy court below.

Essentially, equitable estoppel is a legal proposition which precludes a litigant from adhering to a position that is inconsistent with, or contradicted by, his statements, affirmative conduct, or acquiescence. The touchstone of estoppel lies in concepts of fair play and justice, see, e.g., *Schatzman v. Department of Health and Rehabilitative Services (In re King Memorial Hospital)*, 19 Bankr. 885, 891 (Bankr. S.D. Fla. 1982), although its use is circumscribed to instances where certain technical requirements are present. Gould and Holywell have taken a position through their representations and conduct which contravenes both the legal stance they now assert on appeal and the one which they argued to the bankruptcy court. But prior to deciding estoppel is apposite based on fairness notions, the requirements of that doctrine must be closely examined.

The basic elements that must be established to properly invoke estoppel entail the following: "(1) words, acts, conduct,

or acquiescence, causing another to believe in the existence of a certain state of things; (2) willfulness or negligence with regard to acts, conduct or acquiescence; and (3) detrimental reliance by the other party upon the state of things so indicated." *Dooley v. Weil (In re Matter of Garfinkle)*, 672 F.2d 1340, 1347 (11th Cir. 1982); see also, *Minerals & Chemicals Philipp Corp. v. Milwhite Co.*, 414 F.2d 428 (5th Cir. 1969).

It is ineluctably clear that the first formal element of estoppel is present in the instant appeal. The appellants have repeatedly made representations to the effect of acknowledging that the proceeds from the Washington properties allocable to Twin would be available to creditors in satisfying claims against their estates in bankruptcy. For instance, Gould and Holywell represented to the bankruptcy court, the Bank, and numerous other creditors, that the sale of the Washington properties was

in the best interest of the Debtors and of the creditors in these proceedings in that the immediate cash infusion from such sale[,] which inures to Holywell and Gould[,] [would] provide the Debtors with capital much needed as an essential part of the reorganization sought in these proceedings.

Debtor/Appellants' brief, pg. 3.

Further, prior to the adoption of a reorganization plan by the bankruptcy court, Holywell and Gould submitted disclosure statements and proposed a plan of reorganization. The Holywell disclosure statement made manifest to the court and creditors alike, including the Bank, that the cash proceeds derived from the sale of the Washington properties apportionable to Twin would serve as a source of funds for creditors' claims (see record, No. 466, pg. 4). Additionally, the appellants filed certificates with the bankruptcy court relating to their proposed plans of reorganization, revealing

that funds in excess of fourteen million dollars, including Twin's proceeds from the Washington properties located in a segregated bank account, would be assessable to quench claims of creditors. Indeed, Gould even testified in bankruptcy court that the Twin proceeds "had to go to Holywell as dividends", thus suggesting those funds would be appropriate for the satisfaction of creditors' claims (see record, No. 385h, pgs. 49-50).

In addition to these express representations, Gould and Holywell acquiesced in the Bank's justifiable presumption that Twin's proceeds from the Washington properties would be included within the debtors' estates. For example, the bankruptcy court directed Holywell to deposit into a segregated account any net funds payable to Twin from the sale of the Washington properties. Neither Gould nor Holywell appealed this order by the bankruptcy court, but rather tacitly accepted the order of the court. Moreover, after the Bank moved for a determination that all funds, including the Twin proceeds, were cash collateral subject to the Bank's lien, the bankruptcy court ordered that the proceeds constituted "cash collateral as defined in §363 of the Bankruptcy Code" (see debtor/appellant brief, pg. 79). Neither Gould nor Holywell took appeal from this order.

Subsequently, the Bank filed its proposed plan of reorganization, which directed that the proceeds from the Washington properties attributable to Twin be incorporated with funds in the Miami Center Liquidating Trust and serve as a font for permissible claims against the debtors' estates. The appellants did not enter any objections to the Bank's plan, and after the bankruptcy court approved the Bank's plan, they did not raise the issue presently at bar on appeal.

In totality, the express statements made by Gould and Holywell, amalgamated with their conduct and acquiescence respecting the availability of Twin's proceeds from the sale

of the Washington properties, results in the conclusion that their representations caused the Bank to believe in, and rely on, the existence of a certain state of things: namely, that the Twin funds could be applied to creditors' claims against the liquidation fund established by the bankruptcy court. Accordingly, the first element of estoppel is satisfied.

The second element of estoppel requires a finding that the party against whom the doctrine is imposed acted willfully or negligently with regard to their statements, acts, and acquiescence. *Dooley*, 672 F.2d at 1347. There can be no doubt that Holywell and Gould were, at the very least, negligent in not informing the Bank prior to this motion before the bankruptcy court that it did not intend to allow Twin's proceeds to be applied to creditors' claims. In point of fact, there is a strong inference stemming from Holywell's disclosure statement, the appellants' proposed plan of reorganization, Gould and Holywell's statement that the sale of the Washington properties would be beneficial to creditors, and Gould's testimony, that the actions of Gould and Holywell were willful. In any event, it seems indisputable that Gould and Holywell failed to conduct themselves in a reasonable manner; by neglecting to object to the numerous orders of the bankruptcy court establishing the propriety of applying Twin's proceeds to creditors' claims, and by concealing from the Bank their true intention to thwart such a use of the proceeds if at all legally possible, the appellants evidenced the requisite intent under equitable estoppel.

The third element of estoppel engages the court in an inquiry whether the party to whom representations have been made detrimentally relied upon the state of things as indicated by the representer. *Dooley*, 672 F.2d at 1347. For this element to be met, the Bank must have detrimentally relied on the appellants' representations and conduct. The appellants' statement that the sale of the Washington properties would accrue to the ultimate benefit of creditors,

by providing a cash infusion to the debtors' estates, was relied upon by the Bank in deciding not to object to the sale of the Washington properties. Likewise, the Bank relied on Holywell's disclosure statement, the appellants' failure to complain about the Bank's plan of reorganization and the order adopting that plan, the appellants' failure to appeal an order clarifying that the Twin proceeds could be used by the liquidating trustee, and Gould's testimony, all of which suggested expressly or implicitly that Twin's share of the proceeds from the sale of the Washington properties was available for payment to creditors.

Moreover, the Bank acted upon these statements and the appellants' conduct by distributing a large segment of Twin's funds to creditors. To countenance the legal position assumed by the appellants would cause great detriment to the Bank. The Bank would likely be held responsible for reacquiring any funds paid out of Twin's funds. The Bank's detrimental reliance upon the conduct of the appellants is therefore most patently illustrated by its authorization and distribution of Twin's funds to creditors.

V. Conclusion

Consequently, this court is certain that the imposition of equitable estoppel against the appellants is dictated by precepts of equity, justice and fair play, and accords with the technical elements established in *Dooley*. Gould and Holywell have taken a posture which is surely inconsistent with their express statements and conduct, which led the Bank to distribute the Twin proceeds; the Bank's detrimental reliance on the appellants' representations leads this court to the inexorable conclusion that the appellants cannot maintain their position in this court of law.

In affirming the decision of the bankruptcy court on equitable estoppel grounds, this court pretermitted any

discussion of substantive consolidation. However, it is apparent to this court that the reorganization plan of the bankruptcy court did not "substantively consolidate" Twin within the meaning of that term in §105 of the Bankruptcy Code; Twin's assets and liabilities, with the exception of the proceeds from the sale of the Washington properties, remained wholly intact under the plan of reorganization. Furthermore, assuming substantive consolidation of Twin did occur under the plan adopted by the bankruptcy court, the factors enumerated in *In re Donut Queen Ltd.*, 41 Bankr. 706, 709 (Bankr. E.D.N.Y. 1984), would militate in favor of upholding such action by the bankruptcy court.

Therefore, after careful review and consideration of the record and the court being fully advised in the premises it is hereby;

ORDERED and ADJUDGED that the appeal from the final order of the bankruptcy court granting the liquidating trustee complete control over Twin's proceeds arising from the sale of the Washington properties is affirmed.

DONE and ORDERED at the United States District Court, Miami, Florida this 20th day of February, 1987.

KENNETH L. RYSKAMP
UNITED STATES DISTRICT COURT

copies furnished to:
all counsel of record

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA**

CHAPTER 11 Proceedings

CASE NOS.

84-01590-BKC-TCB

84-01591-BKC-TCB

84-01592-BKC-TCB

84-01593-BKC-TCB

84-01594-BKC-TCB

IN RE: HOLYWELL CORPORATION, et al.,

Debtors.

**AMENDED CONSOLIDATED PLAN OF
REORGANIZATION PROPOSED BY
THE BANK OF NEW YORK**

**CONSOLIDATED
PLAN OF REORGANIZATION**

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The Bank of New York submits the following Plan of Reorganization:

I. DEFINITIONS

In addition to such other terms as are defined in other Articles of this Plan, the following terms have the following meanings as used in this Plan:

Administration Claim: A cost or expense of administration of these Chapter 11 cases, including any actual, necessary expenses of preserving the estates, and any actual, necessary expenses of operating the Debtors' businesses from and after the Petition Dates, to and including the Confirmation Date, and all allowances approved by the Court in accordance with the Code.

Affiliated Creditors: Any "affiliate" of any of the Debtors as "affiliate" is defined in Code §101(2), including but not limited to, any of the Debtors, any corporations that are wholly or partially owned, either directly or indirectly, by all or any of the Debtors, and any entities in which any or all of the Debtors own an equity interest, including, but not limited to, Twin Development Corporation, HWL Corporation, Parkwell, Inc., Orion Industries, Inc., Parkwell of Florida, Inc., Holywell Construction Co., Charleston Center Corp., Pietro Belluschi & Associates, Inc., NHA corp., Studley-Holywell Assoc., Inc., 1300 N. 17th Street Associates, Eleven DuPont Circle Associates, DuPont Land Associates, 1616 Reminc Limited Partnership, 1616 Arlington Associates, PBA, Inc., TBG Institute, Whitehall Security of Florida, Inc., Whitehall Building Services of Florida, Inc., Orion Engineering of Florida, Inc., Holywell Management of Florida, Inc., Racing Club of Florida, Inc., Holywell Hotels of Florida, Inc., Holywell Trading of Florida, Inc., Holywell Real Estate, Holywell Telecommunications of Florida, Inc.,

Holywell Insurance Company, Corpus Christi Associates and Great Western Bank Building Associates, but not including MCJV.

Allowed Claim: A Claim, (a) a proof of which is filed within the time fixed by the Bankruptcy Rules (hereinafter defined) or by the Court, or if the Claim arose from the rejection of an executory contract or unexpired lease, within such other time as may be fixed by the Court, or (b) that has been, or hereafter is, scheduled by Debtors as liquidated in the amount and not disputed or contingent; as to which no objection to the allowance thereof has been filed within any applicable period of time fixed by an order of the Court, or as to which any such objection has been determined by a Final Order.

Bank, The Bank, BNY: The Bank of New York.

Bankruptcy Code or Code: Title 11 U.S.C. Sections 101 *et seq.*

Bankruptcy Rules: The Bankruptcy Rules as prescribed by the Supreme Court of the United States, to take effect on August 1, 1983.

BNY Debt: The indebtedness, including interest at the pre-default contract rate to January 31, 1984 and at the post-default contract rate from February 1, 1984, due to BNY from MCLP and Chopin in the amount of approximately \$234,342,743 as of March 14, 1985 plus expenses of approximately \$1,611,563 to March 14, 1985.

BNY Holywell Loan: The \$1,750,000 loan made by BNY to Holywell on October 23, 1983, which loan was guaranteed by Gould, plus interest to October 23, 1983 to August 31, 1984 at the pre-default contract rate and from September 1, 1984 at the post-default contract rate.

Claim: Any right to payment or right to an equitable remedy for breach of performance if such breach gives rise to a right to payment against any of the Debtors in existence on or as of their respective Petition Dates as described in Section 101(4) of the Code.

Confirmation Date: The date of the entry by the Court of the Order of Confirmation (hereinafter defined).

Court: The United States Bankruptcy Court for the Southern District of Florida, including the Bankruptcy Judge presiding in the Debtors Chapter 11 cases, and any Court having competent jurisdiction to hear appeals therefrom.

Creditor: Any person that holds an Allowed Claim, including governmental units.

Chopin: Chopin Associates, a Florida partnership, one of the Debtors.

Creditors Committees: The Creditors Committee of each of the Debtors, appointed by order of the Bankruptcy Court.

Debtor or Debtors: Gould, MCC, MCLP, Chopin and Holywell, individually and collectively.

Debtors' Plans: The five plans of reorganization, dated February 15, 1985, filed by each of the Debtors'.

Disputed Claim: A claim other than the BNY Debt and the BNY Holywell Loan (i) scheduled by the Debtors as disputed, contingent, undetermined, unliquidated or unknown; or (ii) as to which a timely proof of claim and objection has been filed, and which has not been determined by a Final Order.

Effective Date: The date upon which the Order of Confirmation is no longer subject to appeal, on which date no such appeal is then pending, and on which date all of the conditions to the effectiveness of the Plan expressly set forth in the Plan have been satisfied fully or effectively waived.

Final: Shall mean, with respect to any order, decree or judgment of any Court, that such order, decree or judgement is no longer subject to appeal or rehearing and as to which no appeal, rehearing or motion for rehearing is then pending.

FF&E: The furniture, fixtures and equipment owned by or leased to MCLP pursuant to the FF&E leases.

FF&E Leases: The following four FF&E Leases:

1. Lease, dated May 14, 1981, between MCLP, as Lessee and MCJV, as Lessor covering certain furniture, fixtures and equipment used in the Pavillon Hotel (the "Category A Lease").

2. Lease, dated May 14, 1981, between MCLP, as Lessee and MCJV, as Lessor covering certain furniture, fixture and equipment used in the Pavillon Hotel (the "Category B Lease").

3. Lease, [date unknown], between MCLP, as Lessee and Gould and/or one of the Gould Entities, as Lessor covering certain furniture, fixture and equipment used in the Pavillon Hotel (the "Category C Lease").

4. Lease, [date unknown], between MCLP, as Lessee and Gould and/or one of the Gould Entities, as Lessor covering certain furniture, fixture and equipment used in the Pavillon Hotel (the "Category D Lease").

Gould: Theodore B. Gould, an individual, one of the Debtors.

Gould Entities: Any of the entities comprising the defined term "Affiliated Creditors", which are directly or indirectly 100% owned by Gould, including but not limited to, Twin Development Corporation, Holywell, Whitehall Security, Inc., Orion Industries, Inc., Orion Engineering Services, Inc., Charleston Center Corp., 1300 N. 17th Street Associates, Eleven DuPont Circle Associates, DuPont Land Associates, 1616 Reminc Limited Partnership, 1616 Arlington Associates, PBA, Inc., TBG Institute, Racing Club of Florida, Inc., Parkwell Inc., Parkwell of Florida, Inc., Holywell Construction Company, Holywell Management Company of Florida, Inc., HWL Corporation, Peitro Belluschi & Associates, Inc., Holywell Hotels, Inc., Holywell Telecommunications Company, Holywell Trading of Florida, Inc., Holywell Real Estate, Holywell Telecommunications of Florida, Inc., Holywell Insurance Company, Corpus Christi Associates, Great Western Bank Building, WHA Corp. and Studley-Holywell Assoc., Inc., but not including MCJV.

Gould FF&E Leases: shall mean collectively, the Category C and Category D Leases.

Holywell Corporation: a Delaware corporation, one of the Debtors.

Market Value: \$255,600,000, the appraised market value of Miami Center as of November 15, 1984 as indicated in an appraisal report by Charles V. Failla & Associates, Inc., which report was certified by Charles V. Failla & Associates, Inc., M.A.I.

MCLP: Miami Center Limited Partnership, a Florida limited partnership, one of the Debtors.

MCC: Miami Center Corporation, a Florida corporation, one of the Debtors.

MCJV Claim: shall mean the claim of MCJV filed by O&Y Florida on behalf of O&Y Florida and O&Y Equity for the benefit of MCJV, O&Y Florida and O&Y Equity for unpaid rent due under the MCJV FF&E Leases.

MCJV FF&E Leases: shall mean collectively the Category A and Category B Leases.

MCJV Property: Those unimproved parcels of land adjacent to, or near, Miami Center that are owned by MCJV.

MCJV: Miami Center Joint Venture, a Florida partnership, the partners of which are Gould and O&Y Florida.

Miami Center: The parcel of land located in Miami, Dade County, Florida owned by Chopin and leased to MCLP upon which there is constructed an office/hotel complex.

Miami Center Closing Date: 45 days from the Effective Date.

Order of Confirmation: The Order entered by the Court confirming the Plan in accordance with the provisions of Chapter 11 of the Code.

O&Y: shall mean O&Y Equity and O&Y Florida, collectively.

O&Y Equity: Olympia & York Equity Corp., a New York corporation.

O&Y Florida: Olympia & York Florida Equity Corp., a Florida corporation.

O&Y Arbitration: The arbitration proceeding known as *The Matter of Arbitration between Theodore B. Gould,*

Claimant and Olympia & York Florida Equity Corp. and O&Y Equity Corp., Respondents (Case No. 13-115-0547-82) which proceeding resulted in an Award, dated June 1, 1984. On or about September 20, 1984 O&Y filed a motion requesting the Court to lift the automatic stay, to remove Gould as managing joint venture partner and to require Gould to deliver documents to effectuate his removal. On October 24, 1984 an Order was entered denying that part of O&Y's Motion requesting the removal of Gould and the delivery of documents for his removal but granting a lifting of the automatic stay for the limited purpose of permitting O&Y or Gould to contest the Award. O&Y subsequently brought an action in the United States District Court for the Southern District of New York (Case No. 82-CIV-5918 (WK)), which action seeks to modify or vacate the Award. A hearing was held on February 1, 1985 before Judge Knapp of the Southern District, who reserved decision on the motion.

O&Y Claim: The Claim filed by O&Y Florida against certain of the Debtors on behalf of O&Y Florida and O&Y Equity for the benefit of MCJV, O&Y Florida and O&Y Equity.

Pavillon Hotel: The hotel located in Miami Center.

Parkwell: Collectively, Parkwell Inc., and Parkwell of Florida, Inc., both wholly owned subsidiaries of Holywell.

Pending Litigation: Shall mean the actions described in Exhibit C annexed hereto pending by or against any or all of the Debtors, which Exhibit was taken verbatim from the Debtors' Plans.

Petition Dates: August 22, 1984, the dates on which the Debtors filed their respective Chapter 11 petitions with the Court.

Plan: This Chapter 11 Plan, in its present form, or as it may be amended or modified in accordance with the Code.

Pro-rata: With respect to any distribution on account of any Allowed Claim, in the same proportion as the amount of such Allowed Claim bears to the aggregate amount of all Allowed Claims of its class.

Secured Claim: An Allowed Claim secured by a lien, security interest, judgment or other charge against or interest in property in which any Debtor or the Debtors have an interest, or which is subject to setoff under Section 553 of the Code, not voidable under any section of the Code to the extent of the value (determined in accordance with Section 506(a) of the Code) of the interest of the holder of such Allowed Claim in the Debtors' interest in such property or to the extent of the amount subject to such setoff, as the case may be.

Washington Partnerships: 1300 North 17th Street Associates, 1616 Reminc Limited Partnership, Twin Development Corporation, Eleven DuPont Circle Associates and DuPont Land Associates.

Washington Proceeds: The sum of approximately \$32,422,798.87, which was received by Gould and certain Gould Entities from the sale of the Washington Properties and which is being held, subject to Court order, in accounts established at Florida National Bank.

Washington Properties: The real and personal property conveyed by the Washington Partnerships pursuant to the Agreement dated July 26, 1984, as amended, by and between the Hadid Investment Group, Inc. and the Washington Partnerships.

II. SUBSTANTIVE CONSOLIDATION

Provision for Substantive Consolidation

The Chapter 11 cases filed by the Debtors as Case Nos. 84-01590, 84-01591, 84-01592, 84-01593, and 84-01594 shall on the Effective Date be substantively consolidated pursuant to this Plan and the property of the estates of the Debtors shall be treated as common assets and the Claims of their Creditors deemed Claims against the common assets. As a result of the substantive consolidation of the Debtors, all Claims between and among the Debtors are eliminated by this Plan, including without limitation, all pre-petition claims, all claims, if any, relating to the ground lease between Chopin and MCLP, all claims, if any, relating to or arising out of the Gould FF&E Leases, and all claims of reimbursement, subrogation, and contribution between and among all Debtors.

III. CLASSIFICATION OF CLAIMS AND INTERESTS

For the purposes of distribution under this Plan, Claims and Secured Claims of all Debtors are divided into the following classes:

Class 1—Administration Claims as the same are allowed and ordered paid by the Court.

Class 2—The Secured Claim of BNY for the BNY-Debt, including interest at the pre-default contract rate to February 1, 1984 and at the post-default contract rate thereafter, attorneys' fees, costs and expenses, as provided in the documents evidencing such claims and as authorized under applicable law, as the same are allowed and ordered paid by the Court.

Class 3—The Secured Claim of BNY for the BNY Holywell Loan including interest at the pre-default contract rate to August 31, 1984 and at the post-default contract rate thereafter, attorneys' fees, costs and expenses, as provided in the documents evidencing such claims and as authorized under applicable law, as the same are allowed and ordered paid by the Court.

Class 4—All Secured Claims other than the BNY Debt and the BNY Holywell Loan, including interest at the rate of 10% per annum and attorneys' fees, as authorized under applicable law, as the same are allowed and ordered paid by the court.

Class 5—All Claims which are entitled to priority under Code §507 as the same are allowed, approved and ordered paid by the Court, including claims for wages, salaries and commissions entitled to priority under §507(a)(3) and tax claims of governmental units entitled to priority made §506 and §507(a)(6), and including interest on such Claims as authorized by applicable law and allowed any ordered paid by the Court.

Class 6—The Claims of all general unsecured creditors, excluding claims of Affiliated Creditors, and excluding the MCJV Claim and the O&Y Claim.

Class 7—The MCJV Claim and the O&Y Claim.

Class 8—The Claims of Affiliated Creditors.

Class 9—The interest of the Debtors which remain after consummation of this Plan.

IV. MEANS FOR EXECUTION OF THE PLAN

Sale of Miami Center

The Plan would be implemented by a sale of Miami Center to BNY or its designee for a purchase price of \$255,600,000 pursuant to a contract of sale substantially in the form of Exhibit A annexed hereto (the "Contract of Sale"). Within 5 business days after the Effective Date, the Trustee and BNY or its designee would execute the Contract of Sale, which requires a closing of title within 45 days after the Effective Date.

The purchase price would be paid and applied in the following manner:

(a) BNY would receive a credit for the amount of the BNY Debt plus expenses to the Miami Center Closing Date, which, assuming a closing date of June 1, 1985, and no change in BNY's Prime Rate, would be \$236,587,618.

(b) BNY would pay the balance of the purchase price in cash (approximately \$19,012,382) to the Trustee. The Trustee shall be required to: (i) pay (if requested by BNY, under protest) from such cash the real estate taxes for 1983 and 1984, and pay the Debtors' pro rata portion of the real estate taxes for 1985 due to the Miami Center Closing Date. (ii) pay (if requested by BNY, under protest) from such cash the Personal Property taxes for 1983 and 1984, and pay the Debtors' pro rata portion of the personal property taxes for 1985 due to the Miami

Center Closing Date. (iii) take all steps and to make all payments, from such cash (and, if necessary, from the Washington Proceeds) to exercise the purchase option in the MCJV FF&E leases, and to obtain title to the FF&E covered by the MCJV FF&E Leases.

Title to Miami Center would be delivered to BNY or its designee by the Trustee free and clear of all leases, liens, encumbrances and contracts affecting Miami Center, except those set forth on Exhibit B attached hereto, and except as provided in Article XI hereof. At the closing BNY or its designee would receive fee title to the FF&E covered by the Gould FF&E Leases, as a result of the merger of such leases effected by the substantive consolidation of the estates (or Gould, any of the Debtors, or the Trustee would cause any of the Gould Entities that are Lessors under the Gould FF&E Leases to convey directly to MCLP the FF&E covered by such Leases) and would receive fee title to the FF&E covered by the MCJV FF&E Leases as a result of the exercise of the purchase option on the Miami Center Closing Date. On the Effective Date all other liens and encumbrances, including the mechanics liens and judgment liens on Miami Center are transferred and shall attach to the Trust Property, including the Washington Proceeds, subject to the security interests of BNY securing the BNY Holywell Loan. All contracts affecting Miami Center that are not to be assumed will be rejected in accordance with Article XI hereof. Upon the passing of title of Miami Center to BNY, BNY's lien and security interest in the Washington Proceeds and the other collateral shall be limited to the BNY-Holywell Loan, and the balance of the Washington Proceeds will be available for distribution to Creditors.

BNY may elect to retain its mortgages on and security interests in Miami Center after the passing of title; however, upon the passing of title, the personal liability of the Debtors

on the obligations that are secured by such mortgages and security interests shall be released.

V. CREATION OF TRUST

1. A Trust is hereby declared and established on behalf of the Debtors effective on the Effective Date and an individual to be appointed by the Court (and if requested, after nominations by any party-in-interest) is designated as Trustee of all property of the estates of the Debtors within the meaning of §541(a) of the Code, including but not limited to, Miami Center, the Washington Proceeds, and all claims and causes of action, if any, of the Debtors described in Exhibit C and those pending in the litigation against BNY ("Trust Property") to hold, liquidate, and distribute such Trust Property according to the terms of this Plan. The Trust shall be known as the "Miami Center Liquidating Trust".

2. On the Effective Date, all right, title and interest of the Debtors in and to the Trust Property, including Miami Center, shall vest in the Trustee, without further act or deed by the Debtors or any other of them, and without the filing or recording of any instrument of conveyance, assignment or transfer, *subject however*, to all existing liens, mortgages, security interests and encumbrances.

3. Subject to the provisions of this Plan, and in order to insure the prompt implementation of the Plan, the Trustee shall have full power and authority to:

(a) Enter into the Contract of Sale and to perform all acts that are necessary or appropriate to effect the sale of Miami Center to BNY or its designee in accordance with the Contract of Sale;

(b) Perfect and secure his right, title and interest to the Trust Property;

(c) Reduce all of the Trust Property to his possession and hold the same;

(d) Sell and convert the Trust Property to cash and distribute the proceeds as specified herein;

(e) Manage, operate, improve, and protect the Trust Property as specified herein;

(f) Lease or renew leases;

(g) Grant options to purchase and to contract to sell and sell the property owned by the Trust or any part or parts thereof for such purchase price and for cash or on such terms as may be appropriate;

(h) Mortgage, pledge or otherwise encumber the Trust Property or any part or parts thereof;

(i) Exchange and re-exchange the Trust Property or any part or parts thereof for other real or personal property;

(j) Release, convey or assign any right, title or interest in or about the Trust Property;

(k) Pay and discharge any mortgage or other lien or encumbrance against the Trust Property and pay and discharge any other costs, expenses or obligations deemed necessary to preserve the Trust Property or any part thereof or to preserve the Trust;

(l) Improve or repair the Trust Property or any part thereof;

(m) Purchase insurance of all kinds sufficient to protect fully the Trust Property and to protect from liability

the Trustee, the Creditors Committees and the employee of any member of the Creditors Committees;

(n) Deposit trust funds and draw checks and make disbursements thereof;

(o) Employ attorneys, accountants, engineers, agents, realtors, rental agents, tax specialists and clerical and stenographic assistants as may be deemed necessary, at such compensation as the Trustee may deem reasonable;

(p) Take any action required or permitted by this Plan;

(q) Sue and be sued;

(r) Appoint, remove and act through agents, managers and employees and confer upon them such power and authority as may be necessary or advisable;

(s) Invest funds of the Trust in demand and time deposits in any national bank which is an authorized depository for bankruptcy funds in the federal district in which the Trustee resides or to make temporary investments such as short-term certificates of deposit in such bank or treasury bills;

(t) Prosecute and defend all actions affecting the Trust Property;

(u) Settle, compromise, release, discontinue, or adjust by arbitration or otherwise any disputes, litigations, or controversies in favor of or against the Trust Property or the Debtors or any of them, including but not limited to the discontinuances required by the Contract of Sale;

(v) Waive or release rights of any kind relating to the Trust Property or the Debtors or any of them, including but not limited to the releases required by the Contract of Sale;

(w) Deal with the Trust Property or any part or parts thereof in all other ways as would be lawful for any person owning the same to deal therewith, whether similar to or different from the ways above specified, at any time or times hereafter.

(x) Take no action that would change the business of any of the Debtors as conducted at or prior to the filing of the Petitions.

4. In no case shall any party dealing with the Trustee in any manner whatsoever in relation to the Trust Property, or to any part or parts thereof, be obligated to see that the provisions of this Plan or the terms of the Trust have been complied with, or be obligated or privileged to inquire into the authority of the Trustee to act, or to inquire into any other limitation or restriction of the power and authority of the Trustee, but as to any party dealing with the Trustee in any manner whatsoever in relation to the Trust Property, the power of the Trustee to act or otherwise deal with said properties shall be absolute.

5. The Trustee shall receive reasonable compensation for his services subject to the approval of the Court which fee shall be a charge against and paid out of the Trust Property.

6. All costs, expenses and obligations incurred by the Trustee in administering the Trust or in any manner connected, incidental or related thereto, shall be a charge against the Trust Property, and the Court, upon being satisfied as to the correctness of any and all such costs, expenses and obligations, shall approve and direct the

payment thereof prior to a distribution to the holders of unsecured Allowed Claims.

7. No recourse shall ever be had, directly or indirectly, against the Trustee or any of his agents or employees personally by legal or equitable proceedings or by virtue of any statute or otherwise, it being expressly understood and agreed that all liabilities of the Trustee or such agents are employees or under this Trust shall be enforceable only against and be satisfied only out of the Trust Property.

8. The Trustee shall not be liable for any act or failure to act in his capacity as trustee hereunder while acting in good faith and in the exercise of his best judgment, nor shall the Trustee be liable in any event except for his own gross negligence, willful default or misconduct.

9. The Trustee may resign at any time by giving written notice of his intention to do so addressed to the Court, and such resignation shall be effective upon the date provided in such notice.

10. In case of the resignation of the Trustee, a successor shall thereupon be appointed by an instrument in writing, signed and acknowledged (i) prior to the acquisition of Miami Center by BNY, by BNY and the Creditors' Committee and (ii) subsequent to the acquisition of Miami Center, by the Creditors Committees and delivered to the resigning Trustee, whereupon such resigning Trustee shall convey, transfer and set over to such successor in trust by appropriate instrument or instruments all of the Trust Property then in his possession and held hereunder. Said successor shall thereupon be vested with all the rights, privileges, powers and duties of the Trustee named herein. Each succeeding Trustee may in like manner resign, and another may in like manner be appointed in his place.

11. If BNY or the Creditors Committees at any time desire to terminate the rights of the Trustee then acting under the Trust and appoint a new Trustee in his stead, BNY and the Creditors Committees may do so by a written instrument, addressed to such Trustee then acting; thereupon like conveyances as in the case of resignation of the Trustee shall be made by the Trustee then acting to the newly appointed Trustee, and such new Trustee shall be vested with all the rights, privileges, powers and duties of the Trustee herein named.

VI. TREATMENT OF CLAIMS AND DISTRIBUTION

The cash portion of the Trust Property, together with interest thereon, shall be distributed by the Trustee to satisfy the interest of each Class as defined above (other than the BNY Class 2 Claim) in the following manner and order of priority:

1(a). Class 1 Claims are not impaired. As soon as practicable after the Miami Center Closing Date, all allowed Class 1 Claims which have been incurred prior to the Effective Date and which have been approved by a Final Order of the Court shall be paid by the Trustee in full, unless the holder of any such Class 1 Claims shall have agreed to a different treatment of such Class 1 Claims in which case the holder of such Class 1 Claims shall be paid in accordance with such agreement.

1(b). Class 1 Claims which have been incurred prior to the Effective Date and which have not been approved by the Court on or before the Miami Center Closing Date shall be paid by the Trustee, in full as soon as practicable after the same have been approved by a Final Order of the Court, unless the holder of any such Class 1 Claims shall have agreed to a different treatment of such, in which case the

holder of such Class 1 Claims shall be paid in accordance with such agreement.

1(c). Class 1 Claims incurred subsequent to the Consummation Date shall be paid by the Trustee, in full, as soon as practicable after the same have been approved by the Creditors Committees unless the holder of any such Class 1 Claim shall have agreed to a different treatment of such Claim, in which case the holder of such Class 1 Claim shall be paid in accordance with such agreement.

2. The Class 2 Claim is impaired. The Class 2 Claim consisting of the principal of the BNY Debt and interest thereon at the pre-default contract rate to the Miami Center Closing Date shall be paid and satisfied in accordance with the provisions of Article IV hereof.

3. The Class 3 Claim is impaired. As soon as practicable after the Miami Center Closing Date, the Class 3 Claim consisting of the principal of the BNY Holywell Loan and interest thereon at the pre-default contract rate shall be paid.

4. Class 4 Claims are impaired. As soon as practicable after the Miami Center Closing Date, all Allowed Class 4 Secured Claims shall be paid in full as to principal and shall be paid interest at the rate of 10% per annum.

5. Class 5 Claims are not impaired. As soon as practicable after the Miami Center Closing Date all Allowed Class 5 Claims shall be paid by the Trustee, in full, in an amount equal to the allowed amount of such Class 5 Claim plus interest, unless the holder of any such Class 5 Claim shall have agreed to a different treatment of such Class 5 Claim, in which case the holder of such Class 5 Claim shall be paid in accordance with such agreement.

6. Class 6 Claims may be impaired if there are not sufficient funds to pay this class in full with interest. As soon as practicable after the Miami Center Closing Date all Allowed Class 6 Claims, after payment of the Allowed Class 1, 2, 3, 4 and 5 claims shall be paid in full or in part Pro Rata.

7. Class 7 Claims may be impaired. As soon as practicable after the Miami Center Closing Date, and the entry of a Final Order or Judgment resolving the O&Y Arbitration, the Allowed Class 7 Claims will be paid from the MCJV Property, if there is a deficiency the claim will be paid to the extent that funds are available after payment of the Allowed Class 1, 2, 3, 4, 5 and 6 Claims.

8. Class 8 Claims are impaired. As soon as practicable after the Miami Center Closing Date and after the payment of Allowed Class 1, 2, 3, 4, 5, 6 and 7 Claims, all Allowed Class 8 Claims shall be paid in full or in part Pro Rata.

9. Class 9 Claims are impaired. As soon as practicable after the Miami Center Closing Date all Allowed Class 7 Claims, after payment of Allowed Class 1, 2, 3, 4, 5, 6, 7 and 8 claims the residue of the estates shall be paid to the Debtors Pro Rata.

VII. DISPUTED CLAIMS

A. *Disputed Claim Fund.* As soon as is practicable after the Miami Center Closing Date, and after payment of the Class 1, 2, 3, and 4 Claims out of Trust Property, the Trustee shall establish the Disputed Claim Fund, in an initial amount reasonably necessary to pay the Debtors' anticipated liability on Disputed Claims.

B. *Investment of Disputed Claim Fund.* The Disputed Claim Fund shall be maintained by the Trustee in a separate bank account, and invested and reinvested at prevailing

market rates of interest, for like amounts and periods of investment, pending the determination of the allowed amount of each Disputed Claim.

C. Distribution from Disputed Claim Funds.

1. *Distribution on Allowed Portion of Claim.* If a Disputed Claim is allowed, in whole or in part, the Trustee shall distribute to the holder of any such Disputed Claim an amount equal to what the holder of such Disputed Claim would have received on the Effective Date if such Disputed Claim were an Allowed Claim.

2. *Distribution of Cash Deposited in Respect of Disallowed Portion of Claim.* If a Disputed Claim is disallowed, in whole or in part, the Trustee shall distribute to the holders of class of creditors that has not paid in full their Pro Rata share of cash theretofore deposited in the Disputed Claim Fund allocable to the disallowed amount of such Disputed Claim.

VIII. DUTIES OF THE DEBTORS

Commencing on the Effective Date and continuing thereafter, the Debtors shall devote such time and attention to the affairs of the estates as are necessary to carry out the provisions of the Plan and to comply from time to time with the reasonable requests of BNY, the Trustee and the Creditors Committees. Without limitation of the foregoing the Debtors shall,

(a) in connection with the sale and transfer of Miami Center as provided in Article IV hereof, take all actions requested by BNY, the Trustee or the Creditors Committees to promptly effectuate the sale thereof, including, without limitation, (i) grant

BNY and its attorneys, agents, and accountants full and complete access to the books and records of the Debtors relating in any way to Miami Center and permit BNY to contact any tenants or prospective tenants in Miami Center in connection with the terms and conditions of their occupancy or their proposed occupancy, (ii) deliver to the Trustee, promptly after the Effective Date, all documents required to be delivered to BNY under the Contract of Sale, including but not limited to, all plans specifications, drawings, as built plans and surveys, plans, inventories of all personal property, operating manuals, licenses service and maintenance contracts, and warranties, (iii) take all steps, execute and deliver all documents, and supply all information necessary or appropriate to close the Contract of Sale and to effectuate a transfer of title to Miami Center as contemplated by Article IV hereof, and the Contract of Sale.

(b) In connection with the distribution to the creditors of the Washington Proceeds and the implementation of the Plan, take all action and supply all information required of Debtors and/or requested by the Creditors Committees or the Trustee in connection with the prompt and timely prosecution of objections to claims filed against the estates, the prompt and speedy defense of litigation against the estates and the execution of all documents and the performance of all acts as may be necessary or desirable to promptly implement and effectuate the distribution to the creditors of the estates, other than Affiliated Creditors and the overall implementation of the Plan. The Debtors shall cooperate fully with the Trustee and Creditors Committees and shall grant to the Trustee and

Creditors Committees access to and shall permit the Trustee and Creditors Committees to copy all financial statements, tax returns, books and records of every kind as are within the possession, custody control of any of the Debtors regarding objections to claims against the estate with a view toward the prompt determination of said objections and a prompt consummation of the Plan.

(c) Take any and all actions requested by BNY, the Trustee on the Creditors Committee which are deemed necessary or appropriate by BNY, the Trustee, or the Creditors Committee to implement and perform this Plan, whether or not specifically enumerated herein.

IX. CONDITION PRECEDENT TO THE EFFECTIVENESS OF THE PLAN

A. The Effective Date shall have occurred.

X. CONDITIONS SUBSEQUENT TO THE EFFECTIVENESS OF THE PLAN

A. The Miami Center Closing Date shall have occurred, in any event, by no later than July 1, 1985, and BNY shall have received by such date the discontinuance and releases required to be delivered to BNY under the Contract of Sale. In the event the conditions subsequent have not been satisfied, at BNY's option this Plan shall no longer be effective, and all obligations and agreements of BNY and its designee shall terminate and be of no effect.

XI. EXECUTORY CONTRACTS

A. The executory contracts and unexpired leases listed in Exhibit D and any other existing executory contracts or

unexpired leases relating to Miami Center Phase I with any party not affiliated with any of the Debtors are hereby assumed, unless prior to the Confirmation Date, BNY shall modify this Plan to add or to delete executory contracts or unexpired leases from Exhibit D.

B. Except for executory contracts expressly assumed or rejected prior to sixty (60) days before the date of the Confirmation Order in accordance with 11 U.S.C. § 365, or paragraph A of this Article all executory contracts and unexpired leases of the Debtors shall be deemed rejected as of the date of the Confirmation Order. Claims for damages resulting from the rejection of executory contracts shall be filed with the Court no later than thirty (30) days prior to the date of the Confirmation Order or be forever barred and precluded from consideration or participation in distributions from the estate. Claims for damages resulting from executory contracts which are deemed rejected as of the date of the Confirmation Order in accordance with this Article shall be filed with the Court or be forever barred and precluded from consideration or participation in distributions from the estate. Objections to any such Claims shall be filed by the Trustee or the Creditors Committees with the Bankruptcy Court within twenty (20) days after the Claim in question has been filed.

XII. MODIFICATION OF THE PLAN

BNY may amend or modify this Plan at any time prior to the entry of the Order of Confirmation, pursuant to Section 1127 (a) of the Code. After the entry of the Order of Confirmation, BNY may, pursuant to Section 1127(b) and (c) of the Code and with approval of the Court, modify or amend the Plan in a manner which does not materially or adversely affect the interests of persons affected by the Plan without having to solicit acceptances of such modification, and may take such steps as are necessary to carry out the purpose and effect of the Plan as modified.

XIII. RESERVATION OF EQUITABLE RIGHTS

Notwithstanding anything to the contrary contained herein, all rights are reserved to any party-in-interest, by appropriate proceeding, to assert any equitable claim for relief from the substantive consolidation provisions of the Plan, if, but only to the extent, such substantive consolidation, materially and adversely affects the rights of such party in interest.

XIV. RETENTION OF JURISDICTION

The Court shall retain jurisdiction after confirmation until all payments and distributions called for under the Plan had been made and until the entry of final decree, in respect to the following matters:

(a) to hear and determine all claims, including claims arising from the rejection of any executory contract and any objections which may be made thereto;

(b) to liquidate, or estimate damages or to determine the manner and time for such liquidation or estimation in connection with any contingent or unliquidated claims;

(c) to adjudicate all claims or controversies arising during the pendency of the Chapter 11 cases;

(d) to allow or disallow any claim; and

(e) to make any orders which may be necessary or appropriate to carry out the provisions of this Plan, including any orders relating to the reservation of equitable rights set forth in Article XIII hereof.

Dated: February 26, 1985, as amended as of March 22, 1985.

THE BANK OF NEW YORK

By: /s/ _____

Vice President

EMMET, MARVIN & MARTIN

By: /s/ **THOMAS F. NOONE** _____

48 Wall Street

New York, New York 10005

212-422-2974

STEEL, HECTOR & DAVIS

By: /s/ **VANCE E. SALTER** _____

Southeast Financial Center

Miami, Florida

305-577-2800

**MEYER, WEISS, ROSE, ARKIN,
SHAMPANIER, ZIEGLER &
BARASH, P.A.**

By: /s/ **S. H. ZIEGLER** _____

407 Lincoln Road

Miami Beach, Florida

305-538-2851

**ATTORNEYS FOR THE BANK OF
NEW YORK**

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 84-01590-BKC-TCB
84-01591-BKC-TCB
84-01592-BKC-TCB
84-01593-BKC-TCB
84-01594-BKC-TCB

In re:

HOLYWELL CORPORATION, MIAMI CENTER
LIMITED PARTNERSHIP, MIAMI CENTER
CORPORATION, CHOPIN ASSOCIATES, and
THEODORE B. GOULD,

Debtors.

STIPULATION AND ORDER RESPECTING
IMPLEMENTATION OF AMENDED CONSOLIDATED
PLAN OF REORGANIZATION PROPOSED BY THE
BANK OF NEW YORK

THE BANK OF NEW YORK (the "Bank"), and the
CREDITORS' COMMITTEES of Debtors MIAMI CENTER
LIMITED PARTNERSHIP, MIAMI CENTER
CORPORATION and HOLYWELL CORPORATION
(collectively, the "Committees"), stipulate and agree by
counsel as follows:

1. In the event that the Court confirms the Amended
Consolidated Plan proposed by the Bank, the "Effective Date"
established in the Bank's Amended Consolidated Plan shall
be the date of confirmation, provided that the Court has
denied any motion for rehearing or reconsideration, and
provided that neither (a) the order of confirmation nor (b) any
order denying rehearing or reconsideration has been stayed
by any court.

2. In the event of any conflict between the Contract of Purchase attached to the Bank's Plan and the terms of the Plan itself, the terms of the Plan shall govern, provided that the resolution of such conflict does not adversely affect the title to the Miami Center project to be acquired by the Bank under its Plan.

3. The Bank agrees that any money realized as a result of the tax protests, presently in process for the prior years, shall be added to the fund for the payment of other creditors, provided that the Bank shall be permitted to make the determination to dismiss or settle any such tax protest suits or claims in the event the Bank determines in its sole judgment that it is in the best interest of the Bank to do so.

4. The Liquidating Trustee to be appointed by this Court under the Bank's Plan shall be directed by this Court (a) to pay all "Undisputed Claims" as set forth in an order of this Court, immediately after title to the Miami Center project is vested in the Bank or its nominee pursuant to the Contract of Purchase attached to the Bank's Plan (on or before a date forty-five (45) days after the Effective Date), and (b) to pay all Allowed Claims with interest at the full legal rate, if available in the liquidating fund, provided that such interest shall be paid 90 days after the payment of the principal.

5. The Holywell creditors are entitled to distribution from Holywell assets before distribution from such assets to creditors of other Debtors, and distribution to the Holywell creditors under the Bank's Plan shall be made from the Holywell assets prior to distribution from such assets to creditors of the other Debtors. Such distributions in respect to Undisputed Claims shall be made as provided in Paragraph 4 above, and a fund shall be established by the Liquidating Trustee as a reserve fund for disputed claims. As such disputed claims are allowed, they shall be paid from such fund.

6. In consideration of the approval of this stipulation by the Court and the entry of an Order to that effect, the Committees shall withdraw objections to confirmation of the Bank's Plan and shall encourage and advise their respective members to vote in favor of that Plan.

7. This stipulation shall terminate in the event, and at such time as, the hearing on confirmation of the Bank's Plan is delayed beyond May 31, 1985.

This stipulation is respectfully submitted for approval by the Court and shall become effective as of the date so approved.

THE BANK OF NEW YORK

STEEL HECTOR & DAVIS
4000 Southeast Financial Center
200 South Biscayne Blvd.
Miami, Florida 33131-2398
(305) 577-2804

EMMET MARVIN & MARTIN
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(212) 422-2974

MEYER WEISS ROSE ARKIN SHAMPANIER
ZIEGLER & BARASH, P.A.
407 Lincoln Road
Miami Beach, Florida 33139
(305) 538-2531

By: /s/ S. H. ZIEGLER
S. Harvey Ziegler, Esquire

**CREDITORS' COMMITTEES OF
MIAMI CENTER LIMITED PARTNERSHIP and
MIAMI CENTER CORPORATION**

HOLLAND & KNIGHT
1200 Brickell Avenue
Miami, Florida 33131
(305) 374-8500

By: /s/ IRVING M. WOLFF
Irving M. Wolff, Esquire

**CREDITORS' COMMITTEE OF HOLYWELL
CORPORATION**

BLANK, ROME, COMISKY & McCAULEY
4770 Biscayne Boulevard
Miami, Florida 33137
(305) 573-5500

By: /s/
Joel M. Aresty, Esquire

ORDER APPROVING STIPULATION

The terms of the foregoing stipulation are hereby approved. In the event that The Bank of New York's Amended Consolidated Plan of Reorganization is confirmed, the terms of the stipulation shall be incorporated in the Order of Confirmation.

DONE AND ORDERED, this _____ day of April, 1985,
at Miami, Florida.

UNITED STATES BANKRUPTCY JUDGE

CC: All Counsel of Record
on Attached Service List

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 84-01590-BKC-TCB
84-01591-BKC-TCB
84-01592-BKC-TCB
84-01593-BKC-TCB
84-01594-BKC-TCB

In re:

HOLYWELL CORPORATION, MIAMI
CENTER LIMITED PARTNERSHIP,
MIAMI CENTER CORPORATION,
CHOPIN ASSOCIATES, and
THEODORE B. GOULD,

Debtors.

ADDENDUM TO
STIPULATION AND ORDER RESPECTING
IMPLEMENTATION OF AMENDED CONSOLIDATED
PLAN OF REORGANIZATION PROPOSED BY THE
BANK OF NEW YORK

THE BANK OF NEW YORK (the "Bank"), and the CREDITORS' COMMITTEES of Debtors MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION and HOLYWELL CORPORATION (collectively, the "Committees"), stipulate and agree by counsel to an Addendum to Stipulation and Order Respecting Implementation of Amended Consolidated Plan of Reorganization Proposed by the Bank of New York, as follows:

1. We understand that paragraph 1 of the Stipulation means that the effective date will be no later than 45 days after the confirmation date provided that there is on the

effective date no stay in effect and no Motion for Rehearing or reconsideration pending.

2. We understand that notwithstanding anything in the plan or contract to the contrary, not more than \$2,000,000.00 will be paid under paragraph 4(c) as provided in the plan until all creditors through class 6 are paid in full, including their interest.

3. We understand that the provisions of paragraph 4(b) to the Stipulation as to interest and the payment date thereof also applies to the undisputed claims in paragraph 4(a).

4. We understand that the payment or undisputed claims in paragraph 4 of the stipulation will be with respect to the undisputed portion of each claim and will be without prejudice to the later allowance of the disputed portion of each claim.

This stipulation is respectfully submitted for approval by the Court and shall become effective as of the date so approved.

THE BANK OF NEW YORK

STEEL HECTOR & DAVIS
4000 Southeast Financial Center
200 South Biscayne Boulevard
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(305) 577-2804

EMMET MARVIN & MARTIN
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(212) 422-2974

**MEYER WEISS ROSE ARKIN SHAMPANIER
ZIEGLER & BARASH, P.A.**
407 Lincoln Road
Miami Beach, Florida 33139
(305) 538-2531

By: /s/ S. H. ZIEGLER
 , Esquire

**CREDITORS' COMMITTEES OF
MIAMI CENTER LIMITED PARTNERSHIP and
MIAMI CENTER CORPORATION**

HOLLAND & KNIGHT
1200 Brickell Avenue
Miami, Florida 33131
(305) 374-8500

By: /s/ IRVING M. WOLFF
Irving M. Wolff, Esquire

CREDITORS' COMMITTEE OF HOLYWELL CORPORATION

BLANK, ROME, COMISKY & McCAULEY
4770 Biscayne Boulevard
Miami, Florida 33137
(305) 573-5500

By: /s/ JOEL M. ARESTY
Joel M. Aresty, Esquire

ORDER APPROVING ADDENDUM TO STIPULATION

The terms of the foregoing addendum to stipulation are hereby approved. In the event that The Bank of New York's Amended Consolidated Plan of Reorganization is confirmed, the terms of the addendum to stipulation shall be incorporated in the Order of Confirmation.

DONE AND ORDERED, this _____ day of April, 1985,
at Miami, Florida.

UNITED STATES BANKRUPTCY JUDGE

cc: All Counsel of Record
on Attached Service List

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 84-01590-BKC-TCB
84-01591-BKC-TCB
84-01592-BKC-TCB
84-01593-BKC-TCB
84-01594-BKC-TCB

In re:

HOLYWELL CORPORATION, MIAMI
CENTER LIMITED PARTNERSHIP,
MIAMI CENTER CORPORATION,
CHOPIN ASSOCIATES, and
THEODORE B. GOULD,

Debtors.

SECOND ADDENDUM TO
STIPULATION AND ORDER RESPECTING
IMPLEMENTATION OF AMENDED CONSOLIDATED
PLAN OF REORGANIZATION PROPOSED BY THE
BANK OF NEW YORK

THE BANK OF NEW YORK (the "Bank"), and the CREDITORS' COMMITTEES of Debtors MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION and HOLYWELL CORPORATION (collectively, the "Committees"), stipulate and agree by counsel to a Second Addendum to Stipulation and Order Respecting Implementation of Amended Consolidated Plan of Reorganization Proposed by the Bank of New York, as follows:

1. The Stipulation and Addendum to Stipulation are effective and binding between the parties regardless of whether the Court enters orders approving the same.

3. The parties hereto agree to request the Court to approve the Stipulation, Addendum and this Second Addendum.

STEEL HECTOR & DAVIS
4000 Southeast Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131-2398
(305) 577-2804

**MEYER WEISS ROSE ARKIN SHAMPANIER
ZIEGLER & BARASH, P.A.
407 Lincoln Road
Miami Beach, Florida 33139
(305) 538-2531**

By: _____, Esquire

CREDITORS' COMMITTEES OF
MIAMI CENTER LIMITED PARTNERSHIP and
MIAMI CENTER CORPORATION

HOLLAND & KNIGHT
1200 Brickell Avenue
Miami, Florida 33131
(305) 374-8500

By: _____
Irving M. Wolff, Esquire

CREDITORS' COMMITTEE OF HOLYWELL
CORPORATION

BLANK, ROME, COMISKY & McCAULEY
4770 Biscayne Boulevard
Miami, Florida 33137
(305) 573-5500

By: /s/ JOEL M. ARESTY _____
Joel M. Aresty, Esquire

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

CASES NO. 84-01590-BKC-TCB
84-01591-BKC-TCB
84-01592-BKC-TCB
84-01593-BKC-TCB
84-01594-BKC-TCB

IN RE:

HOLYWELL CORPORATION, et al.

Debtors.

**NOTICE OF FILING OF SECOND
AMENDMENT TO THE AMENDED
CONSOLIDATED PLAN PROPOSED
BY THE BANK OF NEW YORK**

The Bank of New York (the "Bank") has filed a Second Amendment to the Amended Consolidated Plan proposed by the Bank. The Second Amendment is intended to permit immediate confirmation of the Bank's plan while certain legal disputes continue. In substance, the amendments:

1. Provide for the execution and delivery of a Funding Agreement between the Bank and the Trustee (to be appointed under the plan) to enable the Trustee to deliver the furniture, fixtures, and equipment covered by the MCJV FF&E Leases to the Bank or its designee. Pursuant to the Second Amendment, the MCJV FF&E Lease Claim will be paid, on the terms set forth in the Funding Agreement, when all of the disputes relating to the MCJV FF&E Lease Claim have been finally settled or adjudicated.

2. Provide for the issuance by the Trustee to the Bank of a Trustee's Certificate for the amount of any funds

advanced by the Bank pursuant to the Funding Agreement. The obligation of the Trustee under any such Trustee's Certificates will be a Class 1 Claim which shall have priority of payment from, and which shall be secured by, all assets of the debtors' estates after payment or provision has been made for all other Class 1 claims and all Class 2 through Class 6 claims filed by the bar date (January 15, 1985) in these cases, as finally allowed by the Court, and allowed Trustee's fees and expenses in the Chapter 11 cases (but not in any superseding Chapter 7 cases).

The Second Amendment does not adversely affect the rights of the Class 1 through Class 6 creditors or reduce the amount of money available to pay such creditors' claims. Accordingly, no additional disclosure to, or solicitation of acceptances of the Second Amendment from, such creditors is required.

Respectfully submitted,

EMMET MARVIN & MARTIN
48 Wall Street
New York, NY 10005
(212) 422-2974

THERREL BAISDEN & MEYER WEISS
407 Lincoln Road
Miami Beach, Florida 33139
(305) 538-2531

STEEL HECTOR & DAVIS
4000 Southeast Financial Center
200 South Biscayne Blvd.
Miami, Florida 33131-2398
(305) 577-2804

By: /s/ VANCE E. SALTER
Vance E. Salter

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was delivered by hand or by mail (as indicated) to counsel listed on the attached service list this 30th day of July, 1985.

By: /s/ VANCE E. SALTER

Vance E. Salter

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

CASES NO. 84-01590-BKC-TCB
84-01591-BKC-TCB
84-01592-BKC-TCB
84-01593-BKC-TCB
84-01594-BKC-TCB

IN RE:

HOLYWELL CORPORATION, et al.

Debtors:

**SECOND AMENDMENT TO AMENDED
CONSOLIDATED PLAN OF REORGANIZATION
PROPOSED BY THE BANK OF NEW YORK**

The Bank of New York hereby amends its proposed Amended Consolidated Plan of Reorganization as follows:

1. Add to Article I the following definitions:

"BNY Funding Agreement: BNY's agreement to advance to the Trustee up to \$14,417,679, in substantially the form of Exhibit E attached hereto."

"Trustee's Certificate: The Trustee's Certificate of indebtedness to BNY under the Funding Agreement, in substantially the form of Exhibit F attached hereto."

2. Amend Article III, "Class 1" [page 14], to read:

"Class 1—Administration Claims, as the same are allowed and ordered by the Court, and liabilities of the Trustee under any Trustee's Certificate."

3. Add to Article IV, subparagraph (b) (iii) [page 18] the following:

"On the Miami Center Closing Date, BNY agrees to execute and deliver to the Trustee the BNY Funding Agreement."

4. Add to the last paragraph of Article IV [page 19] the following:

"Notwithstanding anything herein contained to the contrary, the liability of the Trustee and the Debtors to BNY under any Trustee's Certificate(s) shall survive the passing of title."

5. Add to Article V, subparagraph (3) [page 24], the following:

"(y) borrow from BNY as contemplated by the BNY Funding Agreement and issue Trustee's Certificates to evidence such borrowing."

6. Change the date in Article X [page 36] from July 1, 1985 to September 15, 1985.

Dated: July 30, 1985

THE BANK OF NEW YORK, by its
undersigned attorneys:

EMMET MARVIN & MARTIN
48 Wall Street
New York, NY 10005
(212) 422-2974

THERREL BAISDEN & MEYER WEISS
407 Lincoln Road
Miami Beach, Florida 33139
(305) 538-2531

STEEL HECTOR & DAVIS
4000 Southeast Financial Center
Miami, Florida 33131
(305) 577-2800

By: /s/ VANCE E. SALTER
Vance E. Salter

EXHIBIT E

UNITED STATES BANKRUPTCY COURT SOUTHERN DISTRICT OF FLORIDA

CASES NO. 84-01590-BKC-TCB
84-01591-BKC-TCB
84-01592-BKC-TCB
84-01593-BKC-TCB
84-01594-BKC-TCB

IN RE:

HOLYWELL CORPORATION, et al.

Debtors.

FUNDING AGREEMENT

Agreement made this _____ day of _____,
1985 between The Bank of New York ("BNY") and
_____, as Trustee.

BACKGROUND

BNY filed a Consolidated Plan of Reorganization in the captioned proceedings on February 26, 1985, which was amended on March 22, 1985. BNY's plan contemplated the acquisition by BNY for \$255,600,000 of the Miami Center Project, which includes an office building, hotel, podium, all furniture, fixtures and equipment ("FF&E") used therein, together with the land upon which such improvements are located. Pursuant to two lease agreements dated May 14, 1981 (the "MCJV FF&E Leases"), Miami Center Joint Venture ("MCJV"), a joint venture consisting of debtor Theodore B. Gould ("Gould") and Olympia & York Florida Equity Corp. ("O&Y"), leased certain FF&E to debtor Miami Center Limited Partnership ("MCLP"). BNY's Amended Plan

of Reorganization required MCLP to deliver title to the FF&E covered by the MCJV FF&E Leases to BNY free and clear of all claims of MCJV.

O&Y on behalf of MCJV filed a claim in the captioned proceedings in connection with the MCJV FF&E Leases on December 20, 1984. On July 3, 1985 MCJV (with the approval of Gould and O&Y) filed a claim in connection with the MCJV FF&E Leases in the total amount of \$14,417,679; that claim was intended to supersede the earlier claim (the MCJV FF&E claim as so superseded is hereinafter called the "MCJV FF&E Lease Claim"). BNY's Amended Plan of Reorganization classified the MCJV Lease Claim as a Class 7 claim, subordinate in right of payment to all third-party creditor claims (Classes 1 through 6). Objections were filed on behalf of MCJV to the proposed classification. BNY has filed Objections to the MCJV FF&E Lease Claim. In addition, BNY maintains that the MCJV FF&E Leases are not "true leases", but are instead financing agreements. By judgment entered July 17, 1985, from which an appeal has been taken by BNY, the Bankruptcy Court determined that the MCJV FF&E Leases were "true leases".

BNY filed a Second Amended Consolidated Plan which, among other things, provided for the execution and delivery of this Funding Agreement to enable the Trustee to deliver the FF&E covered by the MCJV FF&E Leases to the Bank or its designee. BNY's proposed plan as so amended is hereinafter called "BNY's Amended Plan". BNY's Amended Plan was confirmed by Order dated _____, 1985 and the Trustee was appointed to the Amended Plan by Order dated _____, 1985.

NOW THEREFORE, in consideration of the premises, the parties agree as follows:

1. If a Final Order (as defined in BNY's Amended Plan) is entered determining that the MCJV FF&E Lease Claim is entitled to payment prior to or concurrently with the Class 1 through Class 6 creditors' Allowed Claims as set forth in BNY's Amended Plan, BNY will advance to the Trustee, within 10 days after written request therefor, the difference between the amount of such claim as determined by that Final Order and the amount of funds available to the Trustee after payment to, and/or provision for, all Allowed Claims in Classes 1 through 6 of BNY's Amended Plan which were filed by the bar date (January 15, 1985). In no event shall BNY be required to advance more than \$14,417,679 (the "Commitment Amount") hereunder. The Commitment Amount shall be reduced by the amount of any payments made by the Trustee from time to time in respect to the MCJV FF&E Lease Claim.

2. If a Final Order is entered determining that the MCJV FF&E Lease Claim has been properly classified in BNY's Amended Plan (as junior in priority of distribution to the Allowed Class 1 through Class 6 creditors), BNY shall have no obligation to advance any funds hereunder, and this Funding Agreement shall terminate.

3. The Trustee shall issue to BNY a Trustee's Certificate in substantially the form attached as Exhibit F, to evidence any funds advanced by BNY hereunder. The Trustee shall repay BNY from available funds and assets remaining in the debtors' estates, as set forth in the Trustee's Certificate.

4. Unless the context otherwise requires, all other terms used herein shall have the same meanings as set forth in the BNY's Amended Plan.

In Witness Whereof the parties hereto have caused the
Funding Agreement to be executed this _____ day of
_____, 1985.

THE BANK OF NEW YORK

By: _____
Vice-President

By: _____
_____, as Trustee

EXHIBIT F

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA**

**CASES NO. 84-01590-BKC-TCB
84-01591-BKC-TCB
84-01592-BKC-TCB
84-01593-BKC-TCB
84-01594-BKC-TCB**

PROCEEDINGS IN CHAPTER 11

IN RE:

HOLYWELL CORPORATION, et al.

Debtors.

**CERTIFICATE OF INDEBTEDNESS
OF _____, TRUSTEE**

For value received _____, as Trustee (the "Trustee") of the Miami Center Liquidating Trust (the "Trust"), under the Consolidated Plan of The Bank of New York, dated February 26, 1985, as amended by First Amendment to Plan, dated March 22, 1985, and as amended by Second Amendment to Plan, dated July 30, 1985, (the "Plan"), promises to pay to the order of THE BANK OF NEW YORK, at its office at 48 Wall Street, New York, New York 10005 ("BNY") the sum of _____ (\$_____), together with interest thereon from the date hereof to the date of payment at BNY's Prime Rate plus one percent (1%) per annum. "Prime Rate" shall mean the prime commercial lending rate of The Bank of New York as publicly announced to be in effect from time to time, such rate to be adjusted on and as of the effective date of any change in the Prime Rate. Such Prime Rate is not necessarily the lowest lending rate

offered by BNY to its customers from time to time. All interest based on the Prime Rate shall be calculated on the basis of a 360 day year for the actual number of days elapsed. Principal and accrued interest thereon shall be paid as and when funds are available to the Trustee from the liquidation of the debtors' estates.

Unless otherwise defined herein all capitalized terms used in this Certificate shall have the meaning set forth in the Plan.

This Certificate of Indebtedness is the Trustee's Certificate referred to in, and is issued pursuant to, the Plan and the Funding Agreement, and has been issued pursuant to the Order of Confirmation, dated _____.

The obligation of the Trustee under this Certificate is a Class 1 Claim and is entitled to priority in payment under Code Section 507 over all other claims, except (i) Class 1 Claims that have been paid or allowed prior to the date hereof and (ii) Allowed Class 2 through Class 6 Claims that were filed on or before January 15, 1985, together with allowed Trustee's fees and expenses.

In order to secure the obligations of the Trustee under this Certificate and to provide BNY with adequate protection, the Trustee, on behalf of the Trust, grants to BNY a first lien and security interest in all of the Trust Property and proceeds thereof, including without limitation all right, title and interest of the Trustee in the Award, in MCJV, and the proceeds thereof. The Trustee agrees to execute all such security agreements, financing statements, or other instruments as may be reasonably required by BNY in order to evidence or perfect such lien and security interest.

This Certificate shall be binding upon and inure to the benefit of the respective successors and assigns of each of the parties, including a Trustee in a superseding Chapter 7 case.

This Certificate shall be governed by and construed in accordance with the laws of the State of Florida and the Code.

In witness whereof, the Trustee has executed this Certificate on this _____ day of _____, 19____.

MIAMI CENTER LIQUIDATING TRUST

By: _____
Trustee

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

CASES NO. 84-01590-BKC-TCB
84-01591-BKC-TCB
84-01592-BKC-TCB
84-01593-BKC-TCB
84-01594-BKC-TCB

IN RE:

HOLYWELL CORPORATION, et al.

Debtors.

**THIRD ADDENDUM TO STIPULATION
AND ORDER RESPECTING IMPLEMENTATION
OF SECOND AMENDED CONSOLIDATED PLAN
PROPOSED BY THE BANK OF NEW YORK**

THE BANK OF NEW YORK (the "Bank"), and the CREDITORS' COMMITTEES of debtors MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, and HOLYWELL CORPORATION (collectively, the "Committees"), stipulate and agree by counsel to this Third Addendum to the "Stipulation and Order Respecting Implementation of Amended Consolidated Plan of Reorganization Proposed by The Bank of New York", as follows:

1. The Stipulation, Addendum, and Second Addendum shall continue in full force and effect in respect to the Bank's proposed plan as amended July 30, 1985 by the "Second Amendment to Amended Consolidated Plan of Reorganization Proposed by The Bank of New York", except as set forth in Paragraph 2 of this Third Addendum.

2. The \$2,000,000 limitation on payment to creditors below Class 6 (until creditors in Classes 1 through 6 have been paid; paragraph 2 of the First Addendum to the Stipulation) shall not apply to any payments made by the Bank under the additional "Funding Agreement" created as part of the Second Amendment to the Bank's proposed Plan.

3. The parties hereto agree to request the Court to approve the Stipulation, the Addendum and Second Addendum, and the Third Addendum to the Stipulation.

THE BANK OF NEW YORK

EMMET MARVIN & MARTIN
48 Wall Street
New York, NY 10005
(212) 422-2974

THERREL BAISDEN & MEYER WEISS
407 Lincoln Road
Miami Beach, Florida 33139
(305) 538-2531

STEEL HECTOR & DAVIS
4000 Southeast Financial Center
200 South Biscayne Blvd.
Miami, Florida 33131-2398
(305) 577-2804

By: /s/ VANCE E. SALTER

Vance E. Salter, Esquire

**CREDITORS' COMMITTEES OF MIAMI
CENTER LIMITED PARTNERSHIP and
MIAMI CENTER CORPORATION**

**HOLLAND & KNIGHT
1200 Brickell Avenue
Miami, Florida 33131
(305) 374-8500**

**By: /s/ IRVING M. WOLFF
Irving M. Wolff, Esquire**

**CREDITORS' COMMITTEE OF
HOLYWELL CORPORATION**

**BLANK, ROME, COMISKY & McCAULEY
4770 Biscayne Boulevard
Miami, Florida 33137
(305) 573-5500**

**By: /s/ JOEL M. ARESTY
Joel M. Aresty, Esquire**

(3)

NO. 87-1988

Supreme Court, U.S.

FILED

JUL 5 1988

JOSEPH E. SPANIOLO, JR.
CLERK

in the
Supreme Court
of the
United States

October Term, 1987

In re Miami Center Limited Partnership,
Miami Center Corporation, Theodore B. Gould,
Chopin Associates and Holywell Corporation,

Petitioners

vs.

The Bank of New York, et. al.

Respondents.

**RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

HERBERT STETTIN, P.A.
ONE S.E. THIRD AVENUE #2215
MIAMI, FLORIDA, 33131
TELEPHONE 305-374-3353

Attorney for Respondent
Fred Stanton Smith, Trustee
Miami Center Liquidating Trust

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Eleventh Circuit Court of Appeals correctly applied the doctrine of mootness to the facts of this case?

2. Whether the bankruptcy court, district court and Court of Appeals for the Eleventh Circuit committed an abuse of discretion in requiring the posting of a bond as a condition to a stay pending appeal?

PARTIES TO THE PROCEEDING

The parties to this proceeding are the petitioners: Theodore B. Gould, Holywell Corporation, Miami Center Corporation, Miami Center Limited Partnership, and Chopin Associates; Respondent Bank of New York; and Respondent, Fred Stanton Smith, as Trustee of the Miami Center Liquidating Trust.

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STATEMENT OF THE CASE

The petitioners are five affiliated chapter 11 debtors. All were involved in the development of what is known as the Miami Center project, consisting of an office building, a hotel, a shopping arcade and a parking garage. The Bank of New York ("bank") financed construction of the project and was the major creditor. When the construction loans went into default and the bank began foreclosure proceedings the petitioners filed simultaneous voluntary petitions in the United States Bankruptcy Court for the Southern District of Florida, on August 22, 1984. The next day the bankruptcy court granted the debtors' motion for joint administration of the estates.

The debtors and the bank filed competing plans of reorganization. The creditor committees recommended, and the individual creditors overwhelmingly approved, the bank's amended plan and rejected the plans submitted by the debtors. The bank's plan provided for the substantive consolidation of the debtor estates and further provided for the creation of the Miami Center Liquidating Trust and the appointment of a liquidating trustee to administer the trust property in accordance with the terms of the plan.

The trust was funded, *inter alia*, by all of the debtors' 11 U.S.C. Section 541 (a) defined assets, including proceeds from the sale of the Miami Center property to the bank or its nominee, and the proceeds of sale of what is known as the Washington properties to third parties. On August 8, 1985, the bankruptcy court confirmed the bank's plan (246a).

The debtors moved the bankruptcy court for a stay of the confirmation order pending appeal. After a hearing at which the bankruptcy court took evidence of the amount owed creditors and the value of the debtors' assets, the court granted a stay conditioned upon the posting of a \$140 million

bond (46a). On emergency motion of the debtors, the district court lowered the amount of the bond to \$50 million on the assumption the appeal could be expedited and determined in 90 days, and required the bond be filed by October 10, 1985. An appeal of this ruling to the Eleventh Circuit was unsuccessful. No further relief from this order was sought. The debtors did not seek an injunction against implementation of the plan. As there was no bond posted, on October 10, 1985, the plan became effective and the liquidating trustee conveyed the Miami Center property to the bank's designee for \$255.6 million, all as provided in the confirmed plan. The Miami Center property conveyed included fixtures, furnishings and equipment. The bank not only acknowledged it had no further claim against the debtors (excepting only certain claims for fees and costs incurred in enforcing the claim) it also paid the net cash difference between its lien and the purchase price to the liquidating trustee. The trustee then began paying the more than 400 creditors in each class of creditors from reserves established for that purpose (46a).

On appeal to the district court, the debtors attacked the consolidation order and the confirmation order, and the bank and the liquidating trustee moved to dismiss that appeal as moot. The district court held the bankruptcy court had failed to enter sufficient findings of fact and conclusions of law to support an adequate appellate review, and it remanded the case to conduct a hearing for that purpose (47a). The district court denied the bank and the trustee's motions to dismiss the appeal as moot.

On remand, after hearing, the debtors and the bank each submitted proposed findings and conclusions. The bankruptcy court adopted those proposed by the bank. The bankruptcy court held that, *inter alia*, no stay was in effect, the plan has been consummated, and "it is legally and practically impossible to unwind the consummation of the bank's plan

or otherwise restore the status quo before confirmation" (96a). The debtors appealed again.

Without considering the issue of mootness, the district court addressed the merits and the bankruptcy court's elaborate findings (52a), and affirmed in all respects (11a). The debtors appealed to the Eleventh Circuit, which ultimately dismissed the appeal as moot because the plan had been substantially consummated and the court could not grant meaningful relief to the debtors if they prevailed (42a). The debtors thereafter filed Petition for Writ of Mandamus, (Case No 87-1989) and the instant Petition for Writ of Certiorari (Case No: 87-1988).

The debtor had previously filed a petition for writ of mandamus to the Eleventh Circuit to correct certain perceived abuses. That petition was denied (1a).

SUMMARY OF ARGUMENT

The Court of Appeals for the Eleventh Circuit properly applied the doctrine of mootness to the facts of this case. No stay has been in effect, the plan has been substantially consummated for several years, creditors have changed their positions in reliance on the confirmed plan, and the court could not grant meaningful relief even if the debtors were to prevail. The petitioners strain to create a conflict among the federal appellate courts on the issue of mootness where none exists. The federal courts of appeal uniformly decline to hear the merits of an appeal on the ground of mootness when no effective relief can be granted.

The bankruptcy court, the district court and the Eleventh Circuit did not abuse their discretion in requiring the debtors to post a bond as a condition to a stay pending appeal. Where there were over 400 creditors with claims amounting to approximately \$350 million, the requirement of a bond

pending appeal of the confirmation order was surely not in error. This Court should not grant a writ of certiorari in this situation.

ARGUMENT

THE ELEVENTH CIRCUIT PROPERLY APPLIED THE DOCTRINE OF MOOTNESS TO THESE PROCEEDINGS

The Eleventh Circuit's application of the doctrine of mootness in this case was entirely proper. Its order to the district court requiring dismissal of the appeal from the bankruptcy court's order of confirmation of the plan of reorganization was consistent with logic and the law governing substantially consummated plans of reorganization.

The petitioners' argument that the Eleventh Circuit misapplied the doctrine of mootness and that its opinion in this case directly conflicts with the Ninth Circuit's opinion in *In Re Sun Valley, Ranches, Inc.*, 823 F.2d 1373 (9th Cir. 1987), and other decisions of the federal circuits cited therein, is wrong. A careful reading of those cases reveals no conflict with the Eleventh Circuit's decision sought to be reviewed.

The Eleventh Circuit's decision in this case is consistent with the decision of the Ninth Circuit in *In Re Sun Valley Ranches, supra*. In that case, the *Sun Valley* court held that the debtor's appeal from an order lifting the 11 U.S.C. Section 362 automatic stay in order to permit a foreclosure sale to go forward was not rendered moot despite the debtor's failure to obtain a stay, because the court could give meaningful relief—the relief sought was the undoing of the effect of the foreclosure sale, and the purchaser at the sale was a party to the appeal. 823 F.2d at 1375. The Ninth Circuit decision simply carved out a “narrow exception” to the otherwise

general rule that a debtor's failure to obtain a stay renders an appeal moot once the asset is sold. The exception exists where the purchaser is before the court and the court can rescind the sale without prejudice to the rights of parties not before the court, and thereby grant effective relief to the debtor. 823 F.2d at 1375. This rule is consistent with other decisions of the Ninth Circuit, as well as those of the Eleventh Circuit.

Reliance on the *Sun Valley* case is a creative attempt to find a conflict between circuits where none really exists. The operative facts are easily distinguishable. As the *Sun Valley* court stated:

This exception to the general rule is especially appropriate here, where the foreclosure sale is *subject to statutory rights of redemption*. Where the assets sold were shares of stock, we said that 'the fact that the purchaser is a party to [an] appeal does not change the mootness rule' (emphasis added).

823 F.2d at 1375, quoting *Algeran, Inc. v. Advance Ross Corp.*, 759 F.2d 1421, 1424 (9th Cir. 1985).

There is no issue as to a statutory right of redemption in the case at bar. No statutory or contractual delay exists in the enforceability of a plan of reorganization which has been confirmed.

The fact that the purchaser of property sold under the plan is a party to this proceeding does not alter the inapplicability of the exception noted in *Sun Valley*, for it is only one factor to consider in determining whether the court can grant meaningful relief. The Ninth Circuit opinion in *Algeran*, cited with approval in *Sun Valley*, states: "the fact that the purchaser is a party to the appeal does not change the applicability of the mootness rule," specifically

relying upon the Eleventh Circuit's *Sewanee* decision. 759 F.2d at 1424.

The statements made in *Sun Valley*, *supra*, that the court declined to follow the Eleventh Circuit's opinions in *Sewanee*, *supra* and *In re Matos*, 790 F.2d 864 (11th Cir. 1986), must be read in proper context. The *Sun Valley* decision is based upon a stated perception that the Eleventh Circuit follows a *per se* refusal to recognize an appeal on the merits in such a case. That is not an accurate statement of *Sewanee*. In that case, the Eleventh Circuit recognized that "[i]n some situations, failure to obtain a stay pending appeal will render the case moot." 735 F.2d at 1295 (emphasis added). That is not a *per se* refusal to consider the merits of an appeal in all instances where no stay of the effect of an order has been obtained. Moreover, in *Worcester v. Rosner*, 811 F.2d 1224 (9th Cir. 1987), the Ninth Circuit noted that in its *Algeran* decision, it followed "the Eleventh Circuit's approach as to when a stay pending appeal is required in order to prevent mootness." 811 F.2d at 1228.

The petitioners erroneously assert that the Eleventh Circuit's opinion in the instant case is bottomed entirely on a finding that the plan had been substantially consummated as a basis for dismissal of the appeal because of mootness. In fact, the Eleventh Circuit in this case relied on *In re AOV Industries, Inc.* 792 F.2d 1140 (D.C. Cir. 1986), *In re Roberts Farms, Inc.*, 652 F.2d 793 (9th Cir. 1981), and *In re Combined Metals Reduction Co.*, 557 F.2d 179 (9th Cir. 1977), in considering all of the factors in reaching a determination of mootness:

These cases tell us that in considering whether in a reorganization case matters not directly related to sales are within the mootness rule, the court may consider the *passage of time*, whether the plan has

been implemented and whether the plan has been substantially consummated, and *whether there has been a comprehensive change in circumstances*. (Emphasis added).

Miami Center Limited Partnership v. The Bank of New York, 838 F.2d at 1555.

The court then went on to analyze the change in circumstances that led to the conclusion that the debtors' appeal was moot:

We turn, then, to the relief that the debtors seek and the relationship between it and the reorganization plan. The debtors now say that, although they do not agree with the validity of the sale to the bank, they do not seek to overturn it; indeed, they specifically say that they do not want the property back. They want the sale to stand but the property revalued to a higher figure and the sale price adjusted accordingly. They seek cancellation of the trustee's certificate issued to the bank to cover its exposure with respect to the FF & E. They want a realignment of priorities of claims that will place some of their claims ahead of other unpaid creditors and give some 'super priority' ahead of the bank as mortgagee. They want reinstatement of the separate suit they filed against the bank.

The debtors recognize that the relief they request may require the bank's putting up additional cash to preserve its position as purchaser; if so, the bank must sweeten the pot. If it is unwilling to do this, it may have to fall back on its rights as mortgagee.

These prayers for relief must be set against what the bank bargained for, and received as part of the reorganization plan, and the consequences of the plan of granting the prayers. The bank agreed to give up its judgment, calculated at closing at around \$242 million. The amount due under the mortgage and brought forward into the judgment was calculated at "good standing" interest rates; by agreeing to this calculation the bank surrendered a claim to \$5 million—\$6 million of interest at default rates. Presumably if the sale goes for naught the bank would be entitled to this additional amount.

Closing the sale to the bank stopped the running of interest at approximately \$2 million per month. If the sale goes for naught, presumably the bank can seek interest from October 1985, producing an accrual when Judge Aronovitz entered his March 1986 order of approximately \$11 million and currently approximately \$54 million.

The bank bargained for and purchased the FF & E as part of the sale. Because litigation was in progress over whether title to the FF & E was in lessors of the bankrupt, the bank put up \$14 million to pay the lessors if they prevailed. But, since the bank would then have paid twice for the same assets, it was given a trustee's certificate enforceable against assets of the estate to protect it from the double payment. Without the trustee's certificate, if double payment ensues, the bank will become an unsecured creditor to the extent of some \$14 million. The debtors do not suggest any relief for this risk.

The bank put up \$12.5 million of its own money to make up the purchase price. It surrendered \$30 million of cash collateral it was holding. These funds have been the primary source for payments to creditors and reserves totaling approximately \$30 million. The trustee appeared before the district court when, after remand, it heard argument. He pointed out that he had paid some \$14 million in claims, had reserved some \$9 million for claims disputed or in litigation, and held some \$8 million—\$9 million in cash plus some \$7 million in a reserve for contested taxes. The trustee pressed his view that the reorganization plan had to be accepted or rejected in its entirety and that rejection would require him to seek to reclaim what he had paid out, much of which was unrecoverable.

The bank might, of course, not wish to become purchaser of the property at an elevated price or to assume the risk of paying twice for FF & E. It might wish to realize on the cash collateral it had held and to foreclose on the real estate. The debtors have not given a meaningful suggestion of how the bank can get back its \$12.5 million or get back the \$30 million cash collateral; they say only that creditors have some or all of it and are entitled to be paid and that the trustee need not seek to recover back from them.

The bank bargained for dismissal of the separate suit as part of the consideration running to it. The debtors want the case reinstated but do not point to any means of restitution to the bank for being again placed at risk of a fraud/RICO case and subjected to attorneys fees for its defense.

All of this demonstrates that the consequences of what debtors seek strike at the sale of the bank and the reorganization plan as a whole. As in *Roberts Farms* the sale of the primary asset does not 'stand independently and apart from the plan of arrangement,' but rather 'the many intricate and involved transactions . . . were contemplated by the plan of arrangement . . . and stand solely upon the order confirming the plan of arrangement.' 652 F.2d at 797. It is 'impossible to fashion effective relief' for the bank. *Id.* Granting the remedies the debtors seek would 'create an unmanageable, uncontrollable situation for the Bankruptcy Court.' *Id.* (footnote omitted)

838 F.2d at 1551.

It is abundantly clear that the Eleventh Circuit's ruling on mootness is not premised solely upon the notion of substantial consummation.

The petitioners' conspicuous failure to cite the Ninth Circuit's decision in *Roberts Farms* is worthy of mention because of the claim made in the petition that the decision sought to be reviewed conflicts with *In re AOV Industries, Inc.* The court in *AOV* stated that "*Roberts Farms* does not stand for a bright-line rule that 'substantial consummation' forecloses any possibility of relief from court and creditor-approved reorganization plans." *AOV*, 792 F.2d at 1148. Nothing in the Eleventh Circuit's opinion conflicts with that statement. As in *Roberts Farms*, the property transactions herein "do not stand independently and apart from the plan of arrangement. Here the many intricate and involved transactions . . . were contemplated by the plan . . . and stand solely upon the order confirming the plan . . ." *Roberts Farms*, 652 F.2d at 797.

Similarly, the Fourth Circuit's decision in *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 841 F.2d 92 (4th Cir. 1988), is supportive of the liquidating trustee's position that this case is moot because the court cannot grant meaningful relief. The petitioners cite to *Central States* to the effect that substantial consummation does not immunize a plan from appellate review (p. 20, Petition for Writ of Certiorari), yet that statement is taken wholly out of context. The next sentence in *Central States* reflects that the Fourth Circuit's approach to mootness is consistent with that of the Eleventh Circuit:

On the other hand, dismissal of the appeal on mootness grounds is *required* when implementation of the plan has created, extinguished or modified rights of persons not before the court, to such an extent that effective judicial relief is no longer practically available. (Emphasis added).

841 F.2d at 96.

The petitioners also cite *Matter of King Resources Co.*, 651 F.2d 1326 (10th Cir. 1980) as further evidence of a conflict among the circuits. That conflict does not exist. The *King* court "recognize[d] that it is the duty of the courts to decide actual controversies by a judgment which can be carried into effect, and not to give advisory opinions on moot questions or abstract propositions." 651 F.2d at 1331, citing *Mills v. Green*, 159 U.S. 651 (1895). The *King* court unequivocally stated, "if we assumed that the only effect of reversal on appeal would be to order the impossible, we would not address the merits of the appeal." 651 F.2d at 1332, citing *Matter of Combined Metals Reduction Co.*, 557 F.2d 179, 186-91 (9th Cir. 1977). As that court, unlike the Eleventh Circuit, found a reversal could effect meaningful relief, it heard the merits of the appeal. The Eleventh Circuit clearly found no such relief was possible.

The petitioners next search in the Fifth Circuit for a conflict, citing *Matter of Latham*, 823 F.2d 108 (5th Cir. 1987) and *In re Louisiana World Exposition, Inc.*, 823 F.2d 1391 (5th Cir. 1987).

The *Latham* case only held that “[s]atisfaction of a judgment does not moot the appeal unless the defendant-appellant voluntarily satisfies the judgment, thereby misleading the plaintiff into believing the controversy has ended.” 823 F.2d at 111 (citations omitted). That is hardly a conflict with the dismissal in this case.

The *Louisiana World Exposition* case does not even mention the doctrine of mootness, and the liquidating trustee is unable to understand why it is cited.

The petitioners’ ultimate complaint is their failure to obtain a stay should not preclude a review of the case on the merits. This argument does not overcome well established principles of appellate review of bankruptcy orders. “[T]he mootness doctrine promotes an important policy of bankruptcy law—that court approved reorganizations be able to go forward in reliance on such approval unless a stay has been obtained.” *In re Information Dialogues, Inc.*, 662 F.2d 475, 477 (8th Cir. 1981).

The Ninth Circuit has stated that “[i]n the field of administration of estates under the bankruptcy laws, the policy of the law strongly supports a requirement that a stay be obtained if review on appeal is not to be foreclosed because of mootness.” *Roberts Farms*, 652 F.2d at 796.

The mootness doctrine is a practical and fair method of promoting the finality of judgment and certainty of relief which the bankruptcy courts need in order to properly function as reorganization tribunals. The significance of this should not be lightly dismissed. The Eleventh Circuit, in a thorough analysis, properly dismissed the appeal as moot.

THE BANKRUPTCY COURT PROPERLY REQUIRED THE POSTING OF A BOND PENDING APPEAL OF THE CONFIRMATION ORDER

The bankruptcy court properly exercised its discretion in requiring the debtors to post a bond to stay implementation of the plan pending appeal. See Bankruptcy Rule 8005.

Following confirmation of the plan on August 8, 1985, the petitioners moved the bankruptcy court for a stay pending appeal. The bankruptcy court heard evidence as to the amount of the claims of over 400 creditors (approximately \$350 million) and the value of the debtors' assets. After the bank and the debtors submitted memoranda of law, the bankruptcy court agreed to stay implementation of the plan upon the posting of a \$140 million bond by the petitioners. The petitioners promptly appealed to the district court on an emergency basis, and that court lowered the bond to \$50 million as a condition to a stay of enforcement of the plan for ninety days. The debtors' appeal of this ruling to the Eleventh Circuit was denied. The debtors never sought review of that denial before this Court, nor did they seek a temporary injunction against implementation of the plan. See *Texaco, Inc. v. Penzoil Co.*, 626 F.Supp. 250 (S.D.N.Y. 1986), modified on other grounds, 764 F.2d 1133 (2d Cir.), reversed on other grounds, 107 S.Ct. 1519 (1987).

The decision whether to grant a stay pending appeal, and the amount of a bond as a condition of such a stay, are discretionary matters left to the trial court. Such decisions are based upon the particularized facts of each case. This Court does not normally review such decisions. See *United States v. Johnson*, 268 U.S. 220, 227 (1925). This is particularly true where the acts complained of have already been reviewed by the district court and the court of appeals. In such circumstances, this Court has been particularly reluctant to issue a writ of certiorari. See *Rodgers v. Lodge*,

458 U.S. 613, 623 (1982); *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949).

The petitioners imply that no bond should ever be required of debtors in order to stay a bankruptcy appeal because it is obvious debtors cannot afford to post such bonds. Compassionate as this suggestion may be, it overlooks the equally obvious fact that the creditors are entitled to receive their money no later than is absolutely essential. Once a plan has been proposed, voted upon, and confirmed, the debtors' rights have less claim to the court's attention. The equities are clearly in favor of the over 400 creditors rather than the five debtors. The posting of a \$50 million bond on an appeal involving \$350 million in claims cannot rationally be said to be abuse of discretion.

The issuance of a writ of certiorari in this case would be wholly improper. The petition should be denied.

CONCLUSION

This Court should deny the debtors' petition for writ of certiorari, for the Eleventh Circuit properly dismissed the case as moot. No stay was in effect, the plan has been substantially consummated for several years and hundreds of creditors have been paid. The court of appeals, after reviewing the same facts, found it could not undo this plan because it could not grant effective relief in the event of a reversal.

The Eleventh Circuit, in reliance on well-established case law, has held there can be no "piecemeal dismantling" of a plan of reorganization. *Miami Center Limited Partnership v. the Bank of New York*, 838 F.2d at 1554, citing *AOV*, 792 F.2d at 1149.

There is no conflict among the federal circuit courts of appeals on the issue of mootness. They uniformly decline to hear the merits of an appeal where, as in this case, no effective relief can be granted.

The petitioners' claim that *certiorari* should issue on the ground that no debtor should be required to post a bond to stay implementation of a plan of reorganization is entirely frivolous and should be denied.

It is now almost three years since the plan was confirmed and hundreds of creditors have been paid. It is inconceivable

how the Court can undo the plan at this stage. The case is moot and the Petition for Writ of Certiorari should be denied.

Respectfully Submitted,

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4

Supreme Court, U.S.

FILED

JUL 5 1988

JOSEPH F. SPANIOL, JR.

CLERK

NO. 87-1988

in the
Supreme Court
of the
United States

October Term, 1987

In re Miami Center Limited Partnership,
Miami Center Corporation, Theodore B. Gould,
Chopin Associates and Holywell Corporation,

Petitioners

vs.

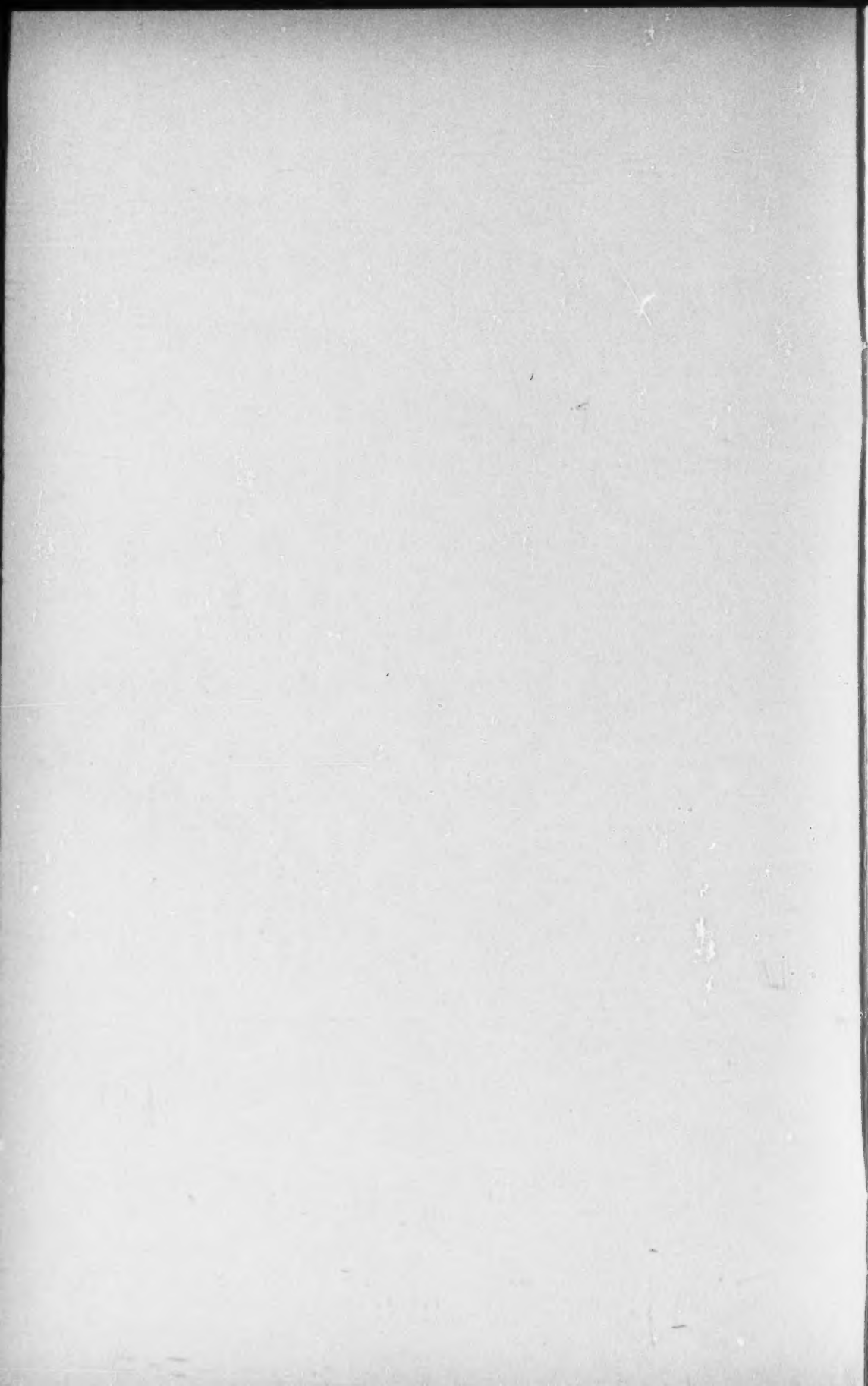
The Bank of New York, et. al.

Respondents.

AMICUS CURIAE BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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Attorney for
Fred Stanton Smith, Trustee
Miami Center Liquidating Trust



IN THE SUPREME COURT OF THE UNITED STATES

CASE NO: 87-1988

IN RE THEODORE B. GOULD,
HOLYWELL CORPORATION,
MIAMI CENTER LIMITED PARTNERSHIP,
CHOPIN ASSOCIATES, AND MIAMI
CENTER CORPORATION,

Petitioners.

MOTION FOR LEAVE TO FILE A BRIEF AMICUS
CURIAE IN OPPOSITION TO PETITION FOR WRIT OF
CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

FRED STANTON SMITH, as Trustee of the Miami Center Liquidating Trust ("Liquidating Trustee"), moves the Supreme Court of the United States for leave to allow the Liquidating Trustee to file a brief *amicus curiae* in opposition to the Petition for Writ of Certiorari filed by Theodore B. Gould, Holywell Corporation, Miami Center Limited Partnership, Chopin Associates, and Miami Center Corporation, and says:

1. Pursuant to Rule 36 of the Rules of the Supreme Court, absent written consent of the parties, the brief of an *amicus curiae* may be filed only upon motion to the Court. Petitioner Theodore Gould, *pro se*, and as president and sole stockholder of Petitioner Holywell Corporation ("Holywell"), has refused to give his consent. Robert Musselman, Esquire, as counsel to Holywell Corporation and the remaining Gould-controlled petitioners, has also refused to consent advising that he has done so upon Gould's instructions.

1

2. The Liquidating Trustee was appointed by order of the Bankruptcy Court pursuant to the terms of the confirmed Amended Consolidated Plan of Reorganization which created the Miami Center Liquidating Trust, and which provided for the appointment of a Liquidating Trustee. The Petitioners acknowledge that the Liquidating Trustee is an interested party on page xii of the Petition for Writ of Certiorari.

3. The Petition for Writ of Certiorari attacks the existence of the Miami Center Liquidating Trust and the Liquidating Trustee. The Petitioners seek the dissolution of the Trust and the termination of the Liquidating Trustee, but are attempting to deny the Liquidating Trustee an opportunity to argue the validity of the Trust and his appointment. This is patently unjust. As the Petition for Writ of Certiorari seeks affirmative relief against the Miami Center Liquidating Trust and the Liquidating Trustee, the Liquidating Trustee should be permitted to appear as an *amicus curiae* to oppose the Petition for Writ of Certiorari.

4. The Liquidating Trustee's interest in this cause is not adequately protected by the existing parties to this proceeding, which are the debtors, the United States Eleventh Circuit Court of Appeals, the United States Bankruptcy Court for the Southern District of Florida, Chief Bankruptcy Judge Thomas C. Britton, Senior Bankruptcy Judge Sidney M. Weaver, and the Bank of New York. The Liquidating Trustee, as representative of the creditors of the Miami Center Liquidating Trust, should not be denied the opportunity to argue the validity of the proceedings below.

WHEREFORE, the Liquidating Trustee respectfully seeks an order from this Court GRANTING this Motion for leave to file a brief *amicus curiae* in opposition to the Petition for Writ of Certiorari filed by Theodore B. Gould, Holywell Corporation, Miami Center Limited Partnership, Miami Center Corporation and Chopin Associates.

RESPECTFULLY SUBMITTED,

Herbert Stettin, Esquire



QUESTIONS PRESENTED FOR REVIEW

1. Whether the Eleventh Circuit Court of Appeals correctly applied the doctrine of mootness to the facts of this case?

2. Whether the bankruptcy court, district court and Court of Appeals for the Eleventh Circuit committed an abuse of discretion in requiring the posting of a bond as a condition to a stay pending appeal?

PARTIES TO THE PROCEEDING

The parties to this proceeding are the petitioners: Theodore B. Gould, Holywell Corporation, Miami Center Corporation, Miami Center Limited Partnership, and Chopin Associates; Respondent Bank of New York; and the *amicus curiae* Fred Stanton Smith, as Trustee of the Miami Center Liquidating Trust (liquidating trustee). The liquidating trustee is filing this brief in opposition to the Petition for Writ of Certiorari as an *amicus curiae* in the event that the Court declines to accept the liquidating trustee's position that he is a party-respondent. The petition states that the liquidating trustee is an interested party (p. ii), but is directed to the Eleventh Circuit (only the petitioners and the Bank of New York were parties in that proceeding). The subject matter of that appeal was the confirmation order of a plan of reorganization, which created the trust and the liquidating trustee. Because the petitioners seek the dissolution of the trust and termination of the liquidating trustee, the liquidating trustee asserts he will be affected by any determination of this petition and is therefore a real party in interest.

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STATEMENT OF THE CASE

The petitioners are five affiliated chapter 11 debtors. All were involved in the development of what is known as the Miami Center project, consisting of an office building, a hotel, a shopping arcade and a parking garage. The Bank of New York ("bank") financed construction of the project and was the major creditor. When the construction loans went into default and the bank began foreclosure proceedings the petitioners filed simultaneous voluntary petitions in the United States Bankruptcy Court for the Southern District of Florida, on August 22, 1984. The next day the bankruptcy court granted the debtors' motion for joint administration of the estates.

The debtors and the bank filed competing plans of reorganization. The creditor committees recommended, and the individual creditors overwhelmingly approved, the bank's amended plan and rejected the plans submitted by the debtors. The bank's plan provided for the substantive consolidation of the debtor estates and further provided for the creation of the Miami Center Liquidating Trust and the appointment of a liquidating trustee to administer the trust property in accordance with the terms of the plan.

The trust was funded, *inter alia*, by all of the debtors' 11 U.S.C. Section 541 (a) defined assets, including proceeds from the sale of the Miami Center property to the bank or its nominee, and the proceeds of sale of what is known as the Washington properties to third parties. On August 8, 1985, the bankruptcy court confirmed the bank's plan (246a).

The debtors moved the bankruptcy court for a stay of the confirmation order pending appeal. After a hearing at which the bankruptcy court took evidence of the amount owed creditors and the value of the debtors' assets, the court granted a stay conditioned upon the posting of a \$140 million

bond (46a). On emergency motion of the debtors, the district court lowered the amount of the bond to \$50 million on the assumption the appeal could be expedited and determined in 90 days, and required the bond be filed by October 10, 1985. An appeal of this ruling to the Eleventh Circuit was unsuccessful. No further relief from this order was sought. The debtors did not seek an injunction against implementation of the plan. As there was no bond posted, on October 10, 1985, the plan became effective and the liquidating trustee conveyed the Miami Center property to the bank's designee for \$255.6 million, all as provided in the confirmed plan. The Miami Center property conveyed included fixtures, furnishings and equipment. The bank not only acknowledged it had no further claim against the debtors (excepting only certain claims for fees and costs incurred in enforcing the claim) it also paid the net cash difference between its lien and the purchase price to the liquidating trustee. The trustee then began paying the more than 400 creditors in each class of creditors from reserves established for that purpose (46a).

On appeal to the district court, the debtors attacked the consolidation order and the confirmation order, and the bank and the liquidating trustee moved to dismiss that appeal as moot. The district court held the bankruptcy court had failed to enter sufficient findings of fact and conclusions of law to support an adequate appellate review, and it remanded the case to conduct a hearing for that purpose (47a). The district court denied the bank and the trustee's motions to dismiss the appeal as moot.

On remand, after hearing, the debtors and the bank each submitted proposed findings and conclusions. The bankruptcy court adopted those proposed by the bank. The bankruptcy court held that, *inter alia*, no stay was in effect, the plan has been consummated, and "it is legally and practically impossible to unwind the consummation of the bank's plan

or otherwise restore the status quo before confirmation" (96a). The debtors appealed again.

Without considering the issue of mootness, the district court addressed the merits and the bankruptcy court's elaborate findings (52a), and affirmed in all respects (11a). The debtors appealed to the Eleventh Circuit, which ultimately dismissed the appeal as moot because the plan had been substantially consummated and the court could not grant meaningful relief to the debtors if they prevailed (42a). The debtors thereafter filed Petition for Writ of Mandamus, (Case No 87-1989) and the instant Petition for Writ of Certiorari (Case No: 87-1988).

The debtor had previously filed a petition for writ of mandamus to the Eleventh Circuit to correct certain perceived abuses. That petition was denied (1a).

SUMMARY OF ARGUMENT

The Court of Appeals for the Eleventh Circuit properly applied the doctrine of mootness to the facts of this case. No stay has been in effect, the plan has been substantially consummated for several years, creditors have changed their positions in reliance on the confirmed plan, and the court could not grant meaningful relief even if the debtors were to prevail. The petitioners strain to create a conflict among the federal appellate courts on the issue of mootness where none exists. The federal courts of appeal uniformly decline to hear the merits of an appeal on the ground of mootness when no effective relief can be granted.

The bankruptcy court, the district court and the Eleventh Circuit did not abuse their discretion in requiring the debtors to post a bond as a condition to a stay pending appeal. Where there were over 400 creditors with claims amounting to approximately \$350 million, the requirement of a bond

pending appeal of the confirmation order was surely not in error. This Court should not grant a writ of certiorari in this situation.

ARGUMENT

THE ELEVENTH CIRCUIT PROPERLY APPLIED THE DOCTRINE OF MOOTNESS TO THESE PROCEEDINGS

The Eleventh Circuit's application of the doctrine of mootness in this case was entirely proper. Its order to the district court requiring dismissal of the appeal from the bankruptcy court's order of confirmation of the plan of reorganization was consistent with logic and the law governing substantially consummated plans of reorganization.

The petitioners' argument that the Eleventh Circuit misapplied the doctrine of mootness and that its opinion in this case directly conflicts with the Ninth Circuit's opinion in *In Re Sun Valley Ranches, Inc.*, 823 F.2d 1373 (9th Cir. 1987), and other decisions of the federal circuits cited therein, is wrong. A careful reading of those cases reveals no conflict with the Eleventh Circuit's decision sought to be reviewed.

The Eleventh Circuit's decision in this case is consistent with the decision of the Ninth Circuit in *In Re Sun Valley Ranches, supra*. In that case, the *Sun Valley* court held that the debtor's appeal from an order lifting the 11 U.S.C. Section 362 automatic stay in order to permit a foreclosure sale to go forward was not rendered moot despite the debtor's failure to obtain a stay, because the court could give meaningful relief—the relief sought was the undoing of the effect of the foreclosure sale, and the purchaser at the sale was a party to the appeal. 823 F.2d at 1375. The Ninth Circuit decision simply carved out a “narrow exception” to the otherwise

general rule that a debtor's failure to obtain a stay renders an appeal moot once the asset is sold. The exception exists where the purchaser is before the court and the court can rescind the sale without prejudice to the rights of parties not before the court, and thereby grant effective relief to the debtor. 823 F.2d at 1375. This rule is consistent with other decisions of the Ninth Circuit, as well as those of the Eleventh Circuit.

Reliance on the *Sun Valley* case is a creative attempt to find a conflict between circuits where none really exists. The operative facts are easily distinguishable. As the *Sun Valley* court stated:

This exception to the general rule is especially appropriate here, where the foreclosure sale is *subject to statutory rights of redemption*. Where the assets sold were shares of stock, we said that 'the fact that the purchaser is a party to [an] appeal does not change the mootness rule' (emphasis added).

823 F.2d at 1375, quoting *Algeran, Inc. v. Advance Ross Corp.*, 759 F.2d 1421, 1424 (9th Cir. 1985).

There is no issue as to a statutory right of redemption in the case at bar. No statutory or contractual delay exists in the enforceability of a plan of reorganization which has been confirmed.

The fact that the purchaser of property sold under the plan is a party to this proceeding does not alter the inapplicability of the exception noted in *Sun Valley*, for it is only one factor to consider in determining whether the court can grant meaningful relief. The Ninth Circuit opinion in *Algeran*, cited with approval in *Sun Valley*, states: "the fact that the purchaser is a party to the appeal does not change the applicability of the mootness rule," specifically

relying upon the Eleventh Circuit's *Sewanee* decision. 759 F.2d at 1424.

The statements made in *Sun Valley*, *supra*, that the court declined to follow the Eleventh Circuit's opinions in *Sewanee*, *supra* and *In re Matos*, 790 F.2d 864 (11th Cir. 1986), must be read in proper context. The *Sun Valley* decision is based upon a stated perception that the Eleventh Circuit follows a *per se* refusal to recognize an appeal on the merits in such a case. That is not an accurate statement of *Sewanee*. In that case, the Eleventh Circuit recognized that "[i]n some situations, failure to obtain a stay pending appeal will render the case moot." 735 F.2d at 1295 (emphasis added). That is not a *per se* refusal to consider the merits of an appeal in all instances where no stay of the effect of an order has been obtained. Moreover, in *Worcester v. Rosner*, 811 F.2d 1224 (9th Cir. 1987), the Ninth Circuit noted that in its *Algeran* decision, it followed "the Eleventh Circuit's approach as to when a stay pending appeal is required in order to prevent mootness." 811 F.2d at 1228.

The petitioners erroneously assert that the Eleventh Circuit's opinion in the instant case is bottomed entirely on a finding that the plan had been substantially consummated as a basis for dismissal of the appeal because of mootness. In fact, the Eleventh Circuit in this case relied on *In re AOV Industries, Inc.* 792 F.2d 1140 (D.C. Cir. 1986), *In re Roberts Farms, Inc.*, 652 F.2d 793 (9th Cir. 1981), and *In re Combined Metals Reduction Co.*, 557 F.2d 179 (9th Cir. 1977), in considering all of the factors in reaching a determination of mootness:

These cases tell us that in considering whether in a reorganization case matters not directly related to sales are within the mootness rule, the court may consider the *passage of time*, whether the plan has

been implemented and whether the plan has been substantially consummated, and *whether there has been a comprehensive change in circumstances.* (Emphasis added).

Miami Center Limited Partnership v. The Bank of New York,
838 F.2d at 1555.

The court then went on to analyze the change in circumstances that led to the conclusion that the debtors' appeal was moot:

We turn, then, to the relief that the debtors seek and the relationship between it and the reorganization plan. The debtors now say that, although they do not agree with the validity of the sale to the bank, they do not seek to overturn it; indeed, they specifically say that they do not want the property back. They want the sale to stand but the property revalued to a higher figure and the sale price adjusted accordingly. They seek cancellation of the trustee's certificate issued to the bank to cover its exposure with respect to the FF & E. They want a realignment of priorities of claims that will place some of their claims ahead of other unpaid creditors and give some 'super priority' ahead of the bank as mortgagee. They want reinstatement of the separate suit they filed against the bank.

The debtors recognize that the relief they request may require the bank's putting up additional cash to preserve its position as purchaser; if so, the bank must sweeten the pot. If it is unwilling to do this, it may have to fall back on its rights as mortgagee.

These prayers for relief must be set against what the bank bargained for, and received as part of the reorganization plan, and the consequences of the plan of granting the prayers. The bank agreed to give up its judgment, calculated at closing at around \$242 million. The amount due under the mortgage and brought forward into the judgment was calculated at "good standing" interest rates; by agreeing to this calculation the bank surrendered a claim to \$5 million—\$6 million of interest at default rates. Presumably if the sale goes for naught the bank would be entitled to this additional amount.

Closing the sale to the bank stopped the running of interest at approximately \$2 million per month. If the sale goes for naught, presumably the bank can seek interest from October 1985, producing an accrual when Judge Aronovitz entered his March 1986 order of approximately \$11 million and currently approximately \$54 million.

The bank bargained for and purchased the FF & E as part of the sale. Because litigation was in progress over whether title to the FF & E was in lessors of the bankrupt, the bank put up \$14 million to pay the lessors if they prevailed. But, since the bank would then have paid twice for the same assets, it was given a trustee's certificate enforceable against assets of the estate to protect it from the double payment. Without the trustee's certificate, if double payment ensues, the bank will become an unsecured creditor to the extent of some \$14 million. The debtors do not suggest any relief for this risk.

The bank put up \$12.5 million of its own money to make up the purchase price. It surrendered \$30 million of cash collateral it was holding. These funds have been the primary source for payments to creditors and reserves totaling approximately \$30 million. The trustee appeared before the district court when, after remand, it heard argument. He pointed out that he had paid some \$14 million in claims, had reserved some \$9 million for claims disputed or in litigation, and held some \$8 million—\$9 million in cash plus some \$7 million in a reserve for contested taxes. The trustee pressed his view that the reorganization plan had to be accepted or rejected in its entirety and that rejection would require him to seek to reclaim what he had paid out, much of which was unrecoverable.

The bank might, of course, not wish to become purchaser of the property at an elevated price or to assume the risk of paying twice for FF & E. It might wish to realize on the cash collateral it had held and to foreclose on the real estate. The debtors have not given a meaningful suggestion of how the bank can get back its \$12.5 million or get back the \$30 million cash collateral; they say only that creditors have some or all of it and are entitled to be paid and that the trustee need not seek to recover back from them.

The bank bargained for dismissal of the separate suit as part of the consideration running to it. The debtors want the case reinstated but do not point to any means of restitution to the bank for being again placed at risk of a fraud/RICO case and subjected to attorneys fees for its defense.

All of this demonstrates that the consequences of what debtors seek strike at the sale of the bank and the reorganization plan as a whole. As in *Roberts Farms* the sale of the primary asset does not 'stand independently and apart from the plan of arrangement,' but rather 'the many intricate and involved transactions . . . were contemplated by the plan of arrangement . . . and stand solely upon the order confirming the plan of arrangement.' 652 F.2d at 797. It is 'impossible to fashion effective relief' for the bank. *Id.* Granting the remedies the debtors seek would 'create an unmanageable, uncontrollable situation for the Bankruptcy Court.' *Id.* (footnote omitted)

838 F.2d at 1551.

It is abundantly clear that the Eleventh Circuit's ruling on mootness is not premised solely upon the notion of substantial consummation.

The petitioners' conspicuous failure to cite the Ninth Circuit's decision in *Roberts Farms* is worthy of mention because of the claim made in the petition that the decision sought to be reviewed conflicts with *In re AOV Industries, Inc.* The court in *AOV* stated that "*Roberts Farms* does not stand for a bright-line rule that 'substantial consummation' forecloses any possibility of relief from court and creditor-approved reorganization plans." *AOV*, 792 F.2d at 1148. Nothing in the Eleventh Circuit's opinion conflicts with that statement. As in *Roberts Farms*, the property transactions herein "do not stand independently and apart from the plan of arrangement. Here the many intricate and involved transactions . . . were contemplated by the plan . . . and stand solely upon the order confirming the plan . . ." *Roberts Farms*, 652 F.2d at 797.

Similarly, the Fourth Circuit's decision in *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 841 F.2d 92 (4th Cir. 1988), is supportive of the liquidating trustee's position that this case is moot because the court cannot grant meaningful relief. The petitioners cite to *Central States* to the effect that substantial consummation does not immunize a plan from appellate review (p. 20, Petition for Writ of Certiorari), yet that statement is taken wholly out of context. The next sentence in *Central States* reflects that the Fourth Circuit's approach to mootness is consistent with that of the Eleventh Circuit:

On the other hand, dismissal of the appeal on mootness grounds is *required* when implementation of the plan has created, extinguished or modified rights of persons not before the court, to such an extent that effective judicial relief is no longer practically available. (Emphasis added).

841 F.2d at 96.

The petitioners also cite *Matter of King Resources Co.*, 651 F.2d 1326 (10th Cir. 1980) as further evidence of a conflict among the circuits. That conflict does not exist. The *King* court "recognize[d] that it is the duty of the courts to decide actual controversies by a judgment which can be carried into effect, and not to give advisory opinions on moot questions or abstract propositions." 651 F.2d at 1331, citing *Mills v. Green*, 159 U.S. 651 (1895). The *King* court unequivocally stated, "if we assumed that the only effect of reversal on appeal would be to order the impossible, we would not address the merits of the appeal." 651 F.2d at 1332, citing *Matter of Combined Metals Reduction Co.*, 557 F.2d 179, 186-91 (9th Cir. 1977). As that court, unlike the Eleventh Circuit, found a reversal could effect meaningful relief, it heard the merits of the appeal. The Eleventh Circuit clearly found no such relief was possible.

The petitioners next search in the Fifth Circuit for a conflict, citing *Matter of Latham*, 823 F.2d 108 (5th Cir. 1987) and *In re Louisiana World Exposition, Inc.*, 823 F.2d 1391 (5th Cir. 1987).

The *Latham* case only held that "[s]atisfaction of a judgment does not moot the appeal unless the defendant-appellant voluntarily satisfies the judgment, thereby misleading the plaintiff into believing the controversy has ended." 823 F.2d at 111 (citations omitted). That is hardly a conflict with the dismissal in this case.

The *Louisiana World Exposition* case does not even mention the doctrine of mootness, and the liquidating trustee is unable to understand why it is cited.

The petitioners' ultimate complaint is their failure to obtain a stay should not preclude a review of the case on the merits. This argument does not overcome well established principles of appellate review of bankruptcy orders. "[T]he mootness doctrine promotes an important policy of bankruptcy law—that court approved reorganizations be able to go forward in reliance on such approval unless a stay has been obtained." *In re Information Dialogues, Inc.*, 662 F.2d 475, 477 (8th Cir. 1981).

The Ninth Circuit has stated that "[i]n the field of administration of estates under the bankruptcy laws, the policy of the law strongly supports a requirement that a stay be obtained if review on appeal is not to be foreclosed because of mootness." *Roberts Farms*, 652 F.2d at 796.

The mootness doctrine is a practical and fair method of promoting the finality of judgment and certainty of relief which the bankruptcy courts need in order to properly function as reorganization tribunals. The significance of this should not be lightly dismissed. The Eleventh Circuit, in a thorough analysis, properly dismissed the appeal as moot.

THE BANKRUPTCY COURT PROPERLY REQUIRED THE POSTING OF A BOND PENDING APPEAL OF THE CONFIRMATION ORDER

The bankruptcy court properly exercised its discretion in requiring the debtors to post a bond to stay implementation of the plan pending appeal. See Bankruptcy Rule 8005.

Following confirmation of the plan on August 8, 1985, the petitioners moved the bankruptcy court for a stay pending appeal. The bankruptcy court heard evidence as to the amount of the claims of over 400 creditors (approximately \$350 million) and the value of the debtors' assets. After the bank and the debtors submitted memoranda of law, the bankruptcy court agreed to stay implementation of the plan upon the posting of a \$140 million bond by the petitioners. The petitioners promptly appealed to the district court on an emergency basis, and that court lowered the bond to \$50 million as a condition to a stay of enforcement of the plan for ninety days. The debtors' appeal of this ruling to the Eleventh Circuit was denied. The debtors never sought review of that denial before this Court, nor did they seek a temporary injunction against implementation of the plan. See *Texaco, Inc. v. Penzoil Co.*, 626 F.Supp. 250 (S.D.N.Y. 1986), modified on other grounds, 764 F.2d 1133 (2d Cir.), reversed on other grounds, 107 S.Ct. 1519 (1987).

The decision whether to grant a stay pending appeal, and the amount of a bond as a condition of such a stay, are discretionary matters left to the trial court. Such decisions are based upon the particularized facts of each case. This Court does not normally review such decisions. See *United States v. Johnson*, 268 U.S. 220, 227 (1925). This is particularly true where the acts complained of have already been reviewed by the district court and the court of appeals. In such circumstances, this Court has been particularly reluctant to issue a writ of certiorari. See *Rodgers v. Lodge*,

458 U.S. 613, 623 (1982); *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949).

The petitioners imply that no bond should ever be required of debtors in order to stay a bankruptcy appeal because it is obvious debtors cannot afford to post such bonds. Compassionate as this suggestion may be, it overlooks the equally obvious fact that the creditors are entitled to receive their money no later than is absolutely essential. Once a plan has been proposed, voted upon, and confirmed, the debtors' rights have less claim to the court's attention. The equities are clearly in favor of the over 400 creditors rather than the five debtors. The posting of a \$50 million bond on an appeal involving \$350 million in claims cannot rationally be said to be abuse of discretion.

The issuance of a writ of certiorari in this case would be wholly improper. The petition should be denied.

CONCLUSION

This Court should deny the debtors' petition for writ of certiorari, for the Eleventh Circuit properly dismissed the case as moot. No stay was in effect, the plan has been substantially consummated for several years and hundreds of creditors have been paid. The court of appeals, after reviewing the same facts, found it could not undo this plan because it could not grant effective relief in the event of a reversal.

The Eleventh Circuit, in reliance on well-established case law, has held there can be no "piecemeal dismantling" of a plan of reorganization. *Miami Center Limited Partnership v. the Bank of New York*, 838 F.2d at 1554, citing *AOV*, 792 F.2d at 1149.

There is no conflict among the federal circuit courts of appeals on the issue of mootness. They uniformly decline to hear the merits of an appeal where, as in this case, no effective relief can be granted.

The petitioners' claim that *certiorari* should issue on the ground that no debtor should be required to post a bond to stay implementation of a plan of reorganization is entirely frivolous and should be denied.

It is now almost three years since the plan was confirmed and hundreds of creditors have been paid. It is inconceivable

how the Court can undo the plan at this stage. The case is moot and the Petition for Writ of Certiorari should be denied.

Respectfully Submitted,

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